Supreme Court, U.S.
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No. (1) _____

UNITED STATES
SUPREME COURT

LOREN REGELIN,

Petitioner

-v.-

ANDREW JACKSON, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Regelin
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930

QUESTIONS PRESENTED

Petitioner Loren Regelin was convicted at a jury trial of conspiracy to deliver cocaine from 225 to 649 grams, with the date on the Information as July 29, 1996. It was alleged that he conspired with David Love and José Gonzales to deliver cocaine from Kent County into Muskegon County. On May 16, 1997, Judge Michael Kobza sentenced Petitioner to life in prison as a second drug offender. Case No. 96-139927-FH.

The questions presented are:

QUESTION 1: WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY THE CONFLICT OF INTEREST OF HIS COUNSEL, PEDRO FERRER, WHO WAS ALSO THE ATTORNEY FOR THE UNCHARGED COCONSPIRATOR IN A DRUG CASE IN KENT COUNTY.

QUESTION 2: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

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No. _____

UNITED STATES
SUPREME COURT

LOREN REGELIN,

Petitioner

-v.-

ANDREW JACKSON, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

LOREN REGELIN, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Sixth Circuit Court of Appeals of January 15, 2008, denying a Petition for rehearing en banc of that Court's affirming the District Court's denial of Petition for Habeas Corpus.

OPINIONS BELOW

The Appendix includes: Michigan Court of Appeals Opinion and Order affirming conviction on January 29, 1999; Muskegon County Circuit Court Opinion of February 26, 2002 and Judgment of February 28, 2003 denying Motion for Relief from Judgment; Michigan Court of Appeals Order of June 2, 2003 denying leave to appeal; Michigan Supreme Court orders of November 24, 2003, denying leave, and February 27, 2004, denying reconsideration; Eastern District of Michigan Opinion and Order of February 24, 2006, denying Petition for Habeas Corpus; Sixth Circuit Court of Appeals Opinion August 24, 2007 affirming, and Order denying rehearing en banc, of January 15, 2008.

STATEMENT OF JURISDICTION.

This case began as a Habeas Corpus proceeding in the Eastern District of Michigan Federal Court challenging the constitutionality of a state court criminal conviction. The United States District Judge entered an Opinion and Judgment denying the Petition for Habeas Corpus on February 24, 2006. The Sixth Circuit Court of Appeals affirmed by decision entered August 24, 2007. Petition for rehearing en banc was filed and denied on January

15, 2008. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Loren Regelin was convicted at a jury trial of conspiracy to deliver cocaine from 225 to 649 grams, with the date on the Information as July 29, 1996. It was alleged that he conspired with David Love and José Gonzales to deliver cocaine from Kent County into Muskegon County. On May 16, 1997, Judge Michael Kobza sentenced Petitioner to life in prison as a second drug offender. Case No. 96-139927-FH.

An appeal of right was taken to the Michigan Court of Appeals. That court affirmed the conviction on January 29, 1999, Case No. 203689. The Michigan Supreme Court denied leave to appeal October 26, 1999. Case No. 114173. Motion for Relief from Judgment was filed in the lower court and a hearing was conducted on February 1, 2002 with the trial court, by successor judge, the Hon. William Marietti, filing an opinion denying the Motion on February 26, 2002. Application for leave to appeal was filed and denied by the Michigan Court of Appeals. Application for leave was filed with the Michigan Supreme Court and denied. Motion for Reconsideration was filed and denied by order entered February 27, 2004.

Petition for Habeas Corpus was timely filed

with the Eastern District of Michigan federal court, and Judge Bernard Friedman entered an order denying the Petition Habeas Corpus on February 24, 2006. Timely appeal was filed with the Sixth Circuit Court and the District Court Judge granted a Certificate of Appealability on the first issue, conflict of interest of his trial counsel, and the Sixth Circuit Court of Appeals granted a Certificate on Issue VI, ineffective assistance of appellate counsel.

The Sixth Circuit Court of Appeals affirmed the District Court opinion and order on September 24, 2007. A timely petition for rehearing en banc was filed and denied by order entered January 15, 2008.

Statement of Facts

Testimony at trial showed that David Love was arrested for a drug offense on July 25, 1996, and agreed to work for the police trying to work up the ladder to indict and arrest suppliers. (T I, 68-70). Police instructed Mr. Love to contact Mr. Regelin and try to make a buy. (T II, 100-107;). Mr. Love testified that on July 29, 1996 he drove with Petitioner to Grand Rapids, where Petitioner went to various locations all within Kent County. Mr. Love testified that ultimately Petitioner produced 4 ounces of cocaine that Mr. Love purchased from Petitioner. (T II, 271-277).

Mr. Love also testified that Petitioner delivered cocaine to him in December 1995 (T II, 210-219), January 1996 (T II, 222-223), and in March 1996. (T II, 241-246). Petitioner told Mr. Love he was getting the cocaine from a man named Joe or José Gonzales. (T II, 251-252).

Mr. Love testified that in December 1995, he wanted cocaine from Petitioner and Petitioner said he was calling to see if the cocaine was ready. (T II, 213). He testified after getting the cocaine, Petitioner said the coke was good. (T II, 217). He testified to getting cocaine from Mr. Regelin in January 1996, but not to any statements, other than that Petitioner said he was going to stop over. (T II, 220-225). In February or March 1996, Mr. Regelin told him that someone was coming to a bar to bring cocaine to Mr. Regelin. (T II, 229), and also that he said "let's finish our beer and leave." (T II, 231). Mr. Regelin told him he got the cocaine from Joe Gonzales of Grand Rapids, in Kent County, which is the next county over from Muskegon County, from which Petitioner's conviction arises. (T II, 251-252).

In July, 1996, when Mr. Love asked for cocaine as a police agent, Mr. Regelin said he would get a hold of someone and get back with him. (T II, 256). Later, Mr. Regelin told Mr. Love to give him a call at 4:00. (T II, 258;). Mr. Regelin later said they should go to Grand Rapids. (T II, 262). Mr. Regelin intended

to stay in Grand Rapids that night. (T II, 267). In Grand Rapids, in Kent County, Mr. Regelin said he could provide one ounce, and that if Mr. Love waited, he could get 3 more. (T II, 273). Mr. Regelin asked for money. (T II, 276).

Mr. Love testified that he stopped buying from Mr. Regelin in March, to get a lower price elsewhere, and only contacted Mr. Regelin again in July as part of his activities working for the police. He was able to stop buying from Mr. Regelin without breaking any agreement with Mr. Regelin. (T II, 246-248).

A tape recording of a conversation between Mr. Regelin and Mr. Love in July was played for the jury, in which Mr. Regelin informs Mr. Love that an unnamed person "has the shit." (T II, 294-301).

Off. Ken Wansted testified that Petitioner admitted buying cocaine in Grand Rapids, Kent County, the largest purchase being 4 ounces. He admitted having sold cocaine in the past to David Love and to John Workman. (T III, 432-433).

Mr. Regelin was found guilty by a jury. A Motion for Relief from Judgment was filed and an evidentiary hearing was held February 1, 2002 before Judge Marietti on the issue of whether Mr. Regelin's trial counsel had a conflict of interest as he also represented an initially unnamed co-conspirator.

A stipulation was entered by the people and defense counsel at the start of this evidentiary

hearing wherein the Muskegon County Prosecutor, Mr. Tague would testify that in the early stages of this case he spoke directly to Mr. Regelin about who his supplier was and that Mr. Tague would further testify that providing this information might lead to a deal for Mr. Regelin. (T 2/01/02, p 4-5). These conversations between the prosecutor and Mr. Regelin occurred while Mr. Regelin was still in jail. They were interested in knowing about his supplier, José Gonzales. (T 2/1/2002, 66). These conversations stopped once Attorney Ferrer showed up and began representing Mr. Regelin even though he was representing the un-indicted but named co-conspirator, José Gonzalez in a drug case in Kent County (Grand Rapids).

Attorney Ferrer testified that he has represented José Gonzales since 1991. (T 2/1/2002, 11). Attorney Ferrer also testified that the location where Petitioner acquired cocaine was José Gonzales's home. (T 2/1/2002, 10). In the course of the representation of Petitioner, attorney Ferrer urged Petitioner to reject a plea bargain, to not continue giving information to the police, and not to testify at his own trial. (T 2/1/2002, 59, 61-64).

Defendant appealed his conviction to the Court of Appeals. He raised five issues.

THE CONVICTION DENIES DUE PROCESS WHERE BASED ON INSUFFICIENT EVIDENCE.

PROSECUTORIAL MISCONDUCT DENIED A FAIR TRIAL.

INSTRUCTIONAL ERROR DENIED DUE PROCESS.

DEFENDANT IS ENTITLED TO A RE-SENTENCING.

SENTENCE IMPOSED IS CONTRARY TO JUDGE'S STATEMENTS AT SENTENCING.

Petitioner later filed a Motion for Relief from Judgment raising the instant issues and others. Relief was denied by the state courts and a Petition for Habeas Corpus was filed and denied by the Eastern District of Michigan Court. Certificates of Appealability were issued with respect to the issues raised herein. The Sixth Circuit affirmed and denied a Petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL BY THE CONFLICT OF INTEREST OF HIS COUNSEL, PEDRO FERRER, WHO WAS ALSO THE ATTORNEY FOR THE UNCHARGED COCONSPIRATOR.

This case involves the important question of whether an attorney, representing a defendant charged in a drug case, can conceal his ongoing relationship with the defendant's supplier, take action to sabotage the defendant's ongoing cooperation with authorities to identify and turn in his supplier, and otherwise handle the case in such a way to give maximum benefit to the supplier regardless of the risk to the defendant. The state courts and the United States District and Circuit Court found no problem with the actions of attorney Pedro Ferrer in placing the interests of his other client, José Gonzales, above the interests of Petitioner Loren Regelin. This ruling is an unreasonable application of established United States Supreme Court case law, and is contrary to W*ood v. Georgia*, 450 U.S. 261; 101 S.Ct. 1097; 67 L.Ed.2d 20 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Mickens v. Taylor*, 535 U.S. 162 (2002).

It is of major significance to the jurisprudence of

the United States the extent to which a lawyer for one drug defendant can arrange his "defense" in such a way to benefit the defendant's supplier, whom he also represented, albeit on another matter. Hearing this case will promote uniformity in decisions, where numerous cases outside the Sixth Circuit find conflict of interest under similar circumstances.

We submit that the actions of attorney Ferrer amounted to selling out Petitioner Regelin to benefit the named but unindicted coconspirator Gonzales, cheating Petitioner out of the 10 to 20 deal he was offered, protecting Gonzales at the cost of a sentence of life without parole for Petitioner. The interests involved and the manner in which conflicted representation occurred so invoke the principles of *Wood v Georgia, Cuyler v. Sullivan,*, and *Mickens v. Taylor,* that denial of remedy would be tantamount to overturning those holdings.

A) Factual basis for Conflict of Interest.

July 25, 1996 a felony information is issued against Petitioner Regelin for conspiracy to deliver cocaine and naming co-conspirators David Love, José Gonzalez Gerald Magnuson, Thomas Nutt, Raymond Alexander and Brad Botbyle. (A 13). The testimony was that David Love had already been arrested and was working for the police to arrange buys, as the police worked their way up the supply ladder, and was in the car when Petitioner bought 112 grams of

cocaine from Gonzales. Petitioner was arrested and arraigned October 9, 1996, and while in jail talked personally with Muskegon County Prosecuting Attorney Tague concerning a plea agreement and information about his supplier. David Love had already done the same thing, that is how the Prosecuting Attorney Tague had arrested Petitioner.

Rather than have Prosecutor Tague testify at an evidentiary hearing, it was stipulated that the prosecutor was in discussion with Petitioner was about information concerning his supplier, José Gonzalez. There were hand written notes made during one of these discussions indicating possible agreements for pleas with cooperation. (A 28).

According to the docket entries of the Muskegon County Circuit Court, one and half months later, attorney Ferrer filed an appearance on behalf of the Petitioner on November 20, 1996, before attorney Ferrer appeared, there was interest in identifying Petitioner's supplier. (T 2/1/2002; 14-15, 35, 48, 57, 88-89).

The District Court concluded this meant there was no adverse effect as no deal that involved petitioner testifying against José Gonzalez was finalized. Petitioner submits the record leads inexorably to the opposite conclusion and the finding therefore is both unreasonable and erroneous. The factual findings strongly support a holding of

conflicted representation that adversely effected representation of Petitioner.

Before attorney Ferrer came on the scene, Petitioner was cooperating and naming names. Once attorney Ferrer appeared, the advice was not to testify and not to identify José Gonzalez. At trial Attorney Ferrer advanced the defense that José Gonzalez was a myth and did not exist. Without Petitioner's assistance, the prosecutor could not charge José Gonzalez for the conspiracy, while Petitioner was found guilty and sentenced to mandatory life in prison without parole.

After appearing and stopping the efforts of Petitioner to name his supplier, José Gonzalez, and obtain favorable sentencing, attorney Ferrer signed a substitution of counsel to represent the very same José Gonzalez on cocaine charges in Kent County, the next county over from Muskegon County, on 1/12/1996 but somehow that document was not presented and entered by that court until 3/12/1996, leaving less than a month before Petitioner's trial started. (A 17).

Before and during Petitioner's trial, José Gonzalez had problems in Kent County Circuit Court and was at risk for substantial penalties, including mandatory life, for prior felony convictions, one in 1992, and another in 1995. (A 24-25).

We submit that Petitioner's trial counsel Pedro

Ferrer had an intolerable conflict of interest that affected his representation of Petitioner, thereby constituting a denial of the constitutional right to counsel.

José Gonzales, also known as Joe Gonzales, was listed as a co-conspirator in the testimony and on the Information. The actions of José Gonzales took place in Kent County, while the conspiracy was charged in Muskegon County, because the drugs were brought back to Muskegon County after Gonzales delivered them to Petitioner in Kent County.

Because David Love had never met or even seen José Gonzales, he had no personal information about the involvement of Mr. Gonzales in any conspiracy. He testified that Petitioner went in a building in Kent County and came out with the drugs, which they brought back to Muskegon County. He testified that Petitioner had told him that his source of cocaine was Joe Gonzales. (T II, 251-252). In the pre-sentence report, Petitioner is also quoted as admitting to getting his cocaine from Gonzales.

The police agent, David Love, could not incriminate José Gonzales apart from hearsay; indeed the only information he did have about Gonzales came from Petitioner Regelin, who was in a position to do considerable damage to the legal interests of Gonzales. If Petitioner was in a conspiracy with Gonzales, then Gonzales was in a

conspiracy with Petitioner. Testimony from Petitioner about his activities with Gonzales would have subjected Gonzales to a conspiracy charge (in either Kent or Muskegon county) and the same life sentence that Petitioner received, Gonzales being a repeat drug offender (see Appendix; Kent County Case No. 91-54132-FH, possession with intent to deliver marijuana). (T 2/1/2002, 88).

Attorney Pedro Ferrer of Grand Rapids was representing José Gonzales (see Appendix; Kent County Case No. 96-FY-330, representation beginning 1-12-96, but not filed with that court until less than a month before Petitioner's trial), but also took the case of Petitioner Loren Regelin (which began with the delivery from Gonzales to Petitioner on June 29, 1996). Stipulated testimony presented at the evidentiary hearing revealed that prior to Attorney Ferrer being retained, Loren Regelin was in the county jail and the elected Muskegon County Prosecutor, Tony Tague, spoke personally to Mr. Regelin, asking for the name of the supplier (Mr. José Gonzales) and indicated further to Loren Regelin that providing this information might lead to a plea agreement. However, upon the appearance of Attorney Ferrer, the defense shut down all discussion of an agreement.

Attorney Ferrer testified that he had represented José Gonzales since 1991. (T 2/1/2002,

11). Attorney Ferrer also testified that the apartment building where the drugs were obtained by Petitioner was José Gonzales's home. In the course of the representation of Petitioner, attorney Ferrer urged Petitioner not to testify at his own trial would not seek a deal that involved cooperation. These pieces of legal advice just happened to coincide nicely with the legal interests of Mr. Gonzales. At a plea, Petitioner would have to tell about the conspiracy, which would involve giving testimony against Mr. Gonzales. At a trial, Petitioner again would have to tell about his drug activities, which involved being a witness to the sale of drugs by Gonzales to Petitioner. [A viable defense at trial could have been based on amount, since the amount on the date in question was less than 650 grams].

Therefore, the case of *People v. Loren Regelin* could have been a disaster for Mr. Gonzales, if Petitioner Regelin had been represented by an attorney who cared only for Mr. Regelin and had no concern for the fate of Mr. Gonzales. However, due to the representation and advice of Mr. Ferrer, Petitioner was advised to and did take a course of action that presented no information about Mr. Gonzales from Mr. Regelin, defusing the danger to Mr. Gonzales.

An impartial reading of the transcripts reveals one consistent theme in attorney Ferrer's defense of

Loren Regelin: that José Gonzalez, the non-arrested, but named co-conspirator, did not exist. Consider the position taken during a Motion to Quash by attorney Ferrer: "we don't know if (Mr. Gonzales) is a ghost or a real person." (1/27/97 Motion). During the opening statement attorney Ferrer argued that there is no Mr. Gonzales, and the name itself is a common name. (T I, p 62-64). This defense continued throughout the trial, up through closing statements wherein attorney Ferrer told the jury: "Joe Gonzales doesn't exist". (TIV, p588).

We submit that attorney Ferrer was burdened by an intolerable conflict of interest. An attorney without a conflict of interest might have recommended a plea or no plea, trial or no trial, testimony by Petitioner or no testimony by Petitioner, argued existence of Gonzales or nonexistence of Gonzales. However, an attorney with a conflict of interest has two masters, and his decisions in the Regelin case were hopelessly tainted by Mr. Ferrer's allegiance to Mr. Gonzales.

The right to have an attorney not burdened by a conflict of interest is an essential part of the constitutional right to counsel. U.S. Const., Amend. VI; *Wood v. Georgia*, 450 U.S. 261; 101 S.Ct. 1097; 67 L.Ed.2d 20 (1981). An attorney is to vigorously act to advance the interests of his client, undeflected by conflicting considerations. *Beasley v. United States*,

491 F.2d 687 (6th Cir. 1974). The same standards for conflict of interest apply whether the attorney is retained or appointed. *Cuyler v. Sullivan*, 446 U.S. 335, 344; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980).

B. The Courts below unreasonably applied the established law.

In *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) the Court held:

> "Under the rule of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), when an attorney's representation of multiple defendants, though not objected to at trial, results in an actual conflict of interest that adversely affects the attorney's performance, the defendants' Sixth Amendment rights have been violated, even without a showing that the conflict caused the defendant to lose his or her case."

The Sixth Circuit in *McFarland* defined the "adverse effect" standard:

> "'Effect on representation' meant that the conflict caused the attorney's choice, not that the choice was prejudicial in any other way."

The District Court held that *Cuyler* applied as Petitioner demonstrated that his attorney was concurrently representing an unindicted, but named coconspirator, but the claim failed for lack of any

adverse effect unreasonably finding that attorney Ferrer's actions could be harmlessly explained:

> "Petitioner claims that Ferrer's performance was adverse because Ferrer advised him not to cooperate with police and not to implicate Gonzales. Ferrer, however, denied advising Petitioner not to cooperate with police. Ferrer explained that Petitioner denied making admissions to police regarding his drug dealing and said that the police did not have a case against him. Ferrer also stated that Petitioner told him that the police wanted him to be a "snitch" but he would not do so. *Id.* at pp. 14, 28, 34, 45.
>
> Petitioner relatedly alleges that Ferrer advised him not to accept a plea bargain and/or failed to pursue a better deal by having him offer testimony against Gonzales. At the evidentiary hearing, however, Ferrer denied advising Petitioner not to take a plea. Ferrer said that he approached the prosecutor about a plea and was initially rejected. The prosecutor subsequently offered a plea in which Petitioner would receive 10 to 20 years in Muskegon County and a consecutive 10 to 20 years in Kent County. Petitioner was not required to testify against anyone as part of the plea. *Id.* at pp. 18, 81. "

The unreasonableness is seen when making an impartial reading of the record which reveals the existence of both interest and discussions concerning

cooperation and identification of José Gonzalez before attorney Ferrer appeared for Petitioner and the nature of the plea that attorney Ferrer claimed to have worked *out which would never involve* cooperation or identification of his other client, José Gonzalez.

Furthermore, the District Court's ruling is erroneous. The ruling intimates that because trial counsel did not admit to the conflict Petitioner has failed to prove the existence of the conflict.

In *McFarland v. Yukins*, supra, the Court held that it is not necessary that the attorney admit the conflict or the effect on representation, that it can be inferred from taking action for one client that benefited another:

> "A defendant or habeas petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests. Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests. "[B]oth taking action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse effect." *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (en

banc) (quotation marks omitted), *aff'd*, 535 U.S. 162 (2002)."

Regardless of the credibility of Mr. Ferrer, the fact is that his ADMITTED conduct shows a disgraceful and unethical course of conduct in this case:

> "Q Very good. Now, during your representation of Mr. Regelin, did you ever have a conversation with him about the possibility of Mr. Regelin giving testimony against José Gonzales as part of a possible deal?
>
> A No, sir. No, sir." (Testimony of Ferrer, T 2/1/2002, 14).

Mr. Ferrer's excuse for not advancing this possibility to his client: "In Muskegon County, it's particularly well-known in this West Michigan in drug cases that they make no deals and they're very tough on that." (T 2/1/2002, 15). Prosecutor Victor Fitz testified that Muskegon County does make such deals, and that they made one in this very case to prosecution witness David Love. (T 2/1/2002, 87).

When Mr. Ferrer testified that the subject of having Petitioner Regelin make a deal to give testimony against his supplier, José Gonzales, never came up, he is admitting that he never brought it up.

There is no doubt that in this case, with strong corroborated evidence of Petitioner's involvement in the 112 gram delivery of July 29, 1996, with a tape recording of Petitioner discussing his drug dealing activities with informant David Love, with Petitioner's confession to police of drug dealing, with the personal request of Prosecutor Tony Tague that Petitioner work to give up his supplier, and with the repeated attempts of Assistant Prosecutor Victor Fitz to make a deal even during trial, attempting to secure a deal with the prosecution for Petitioner to give up his supplier would be a reasonable strategy for an attorney to follow.[1] A reasonable attorney would certainly have considered persuading Petitioner Regelin to take a deal. A reasonable attorney would certainly have considered persuading Petitioner Regelin to offer testimony against his supplier to get an even better deal. Attorney Ferrer had to forego these reasonable choices to avoid angering his long-term client, Mr. Gonzales.

There can be no doubt that if such a deal were made, and José Gonzales learned that it was his own

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[1] Petitioner-Appellant submits that it was not only a reasonable strategy, but by far the best strategy. However, in a conflict of interest situation, the standard is that the strategy affected by the conflict need not be the best strategy, but only a reasonable one.

attorney who arranged for him to be charged with a major drug offense, and his own attorney who arranged for the testimony against him, José Gonzales would not have liked that.

Mr. Ferrer explained that Petitioner Regelin at all times steadfastly declared that he would never plead guilty to anything, period, and that is why he did not suggest that Mr. Regelin attempt to prosecute Mr. Ferrer's other client. Even if true, Mr Ferrer's conduct was inexcusable. Any defendant will have a natural reluctance to turn on his friends. It is the duty of an attorney in a criminal case, where the opportunity presents itself, to seek to encourage the defendant to overcome that natural reluctance, where doing so may be in the client's best interest. It is impossible to imagine Mr. Ferrer telling Petitioner, "Come on Loren, you could get a life sentence here if you don't turn on José. You really ought to consider it."

In *Holloway v. Arkansas*, 435 U.S. 475; 98 S.Ct. 1173; 55 L.Ed.2d 426 (1978), the Court held that the failure of the trial court to appoint different counsel for the two defendants "deprived defendants of the guarantee of 'assistance of counsel,'" and reversed without inquiry into prejudice. The reason was that in a case involving conflict of interest the evil "is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible

pretrial plea negotiation and in the sentencing process."

In *Wood v. Georgia*, supra, the Court held, at 271-272:

> "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest. E.g. *Cuyler v. Sullivan*, 446 U.S. 335; 100 S.Ct. 1708; 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475; 98 S.Ct. 1173; 55 L.Ed.2d 426 (1978). Here, petitioners were represented by their employer's lawyer, who may not have pursued their interests single-mindedly."

In Mickens v. Taylor, 535 U.S. 162 (2002), the Court held:

> "An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."

In *Zuck v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979), the Court stated the following standard:

> "An actual conflict of interest occurs when a defense attorney places himself in a situation 'inherently conducive to divided loyalties.'" ...
>
> "the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other

> client. The fact that a particular lawyer may actually resist that temptation is of no moment."

Although the District Court held that attorney Ferrer's representation of the unindicted coconspirator was concurrent with his representation of Petitioner, the District Court erroneously held there was no "causal connection between Ferrer's concurrent (but not joint) representation" (Op. 23).

This finding was both unreasonable and erroneous. Even if every word spoken by Ferrer is believed, his own admissions demonstrate a conflict of interest.

In *Thomas v. Foltz*, 818 F.2d 476 (6th Cir. 1987), the Court found a conflict of interest of counsel where the attorney failed to pursue a plea bargain, and plea bargaining for the defendant could have adversely affected another client of the attorney. The Court noted with approval the holding in *Baty v. Balkcom*, 661 F.2d 391 (5th Cir.1981) that:

> "an actual conflict of interest existed before trial because h d the attorney "not been facing a conflict of interest, [he] might have been able to negotiate a plea agreement on [the petitioner's] behalf in return for becoming a prosecution witness against [the codefendant]."

In *United States v. Hall*, 200 F.3d 962 (6th Cir.

2000), the Court found a conflict of interest where counsel failed to pursue a plea bargain because it would have helped one of his clients to the detriment of another. The Court held that "Foregoing plea negotiations is proof of an actual conflict of interest." In this case, the prosecutor was discussing a plea agreement with Loren Regelin that involved providing incriminating evidence against his supplier, José Gonzalez. One of the first things accomplished when attorney Ferrer began his representation of Regelin was the termination of these plea agreement discussions. Later as trial approached, plea agreements were discussed again, however attorney Ferrer advised Petitioner not to take a plea bargain; a course of action which would prevent the Petitioner from giving testimony that would incriminate his other client, José Gonzales.

In *United States v. Phillips*, 699 F.2d 798 (6th Cir. 1983), the Court found a conflict of interest where one client of the attorney had named another client of the attorney as the source of the drugs. In *Serra v. Michigan Department of Corrections*, 4 F.3d 1348 (6th Cir. 1993), the Court held it was proper to disqualify an attorney representing 2 defendants where the dual representation interfered with the prosecutor's attempts to plea bargain with one of the defendants. In *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974), the attorney represented a witness

against the defendant on an unrelated civil matter. The Court found a conflict of interest, because the civil client might have discharged the attorney if he cross-examined too vigorously, or if he won the criminal case. The rule of these cases was followed in *Matter of Grand Jury Proceedings*, 428 F. Supp. 273 (ED Mich., 1976). One attorney represented 4 people who had been subpoenaed to the grand jury. Because the full testimony of one witness might have been damaging to another witness, this created a conflict of loyalty in representation. The attorney had to be disqualified.

Obviously, Mr. Ferrer had a similar situation that was even worse, because his other client was a criminal client. Certainly, José Gonzales would not have been pleased if his own attorney had another client of his give testimony against Mr. Gonzales. Mr. Ferrer was compelled by the circumstances to find a way of representing Petitioner that did not prejudice the interests of Mr. Gonzales. This required that Petitioner stop talking to the prosecutor about a deal, that Petitioner take no plea, and give no testimony at trial.

If an attorney recommends a plea for the defendant, and that plea happens to help another client of that attorney, there is a conflict of interest that invalidates the plea. *People v. Clark*, 106 Mich. App. 771 (1981). Case law holds that the converse is

true, that is, if the attorney recommends that the defendant not take a plea, and that action happens to help another client of that attorney, there is a conflict of interest. See *United States v. Hall*, supra; *Thomas v. Foltz*, supra. See also *People v. Simmons*, 134 Mich. App. 779 (1984), finding conflict of interest where vigorously advancing the interests of one client had the potential to harm another client.

C. There was an adverse effect on representation.

In *Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996), the Court held:

> "to show adverse effect, a petitioner must demonstrate that some plausible defense strategy or tactic might have been pursued but was not, because of the conflict of interest."

The Court in *Perillo* cited decisions of other Courts in accordance with that rule:

> "Other circuits have expressed the standard similarly. *United States v. Rodriguez*, 929 F.3d 747, 751 (1st Cir. 1991) (the petitioner "must demonstrate that some plausible alternative defense strategy or tactic might have been pursued."); *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991) (adverse effect when "a specific and seemingly valid or genuine alternative

> strategy was available to defense counsel, but it was inherently in conflict with his duties to others.") (internal quotations omitted); *Winkler v. Kleane*, 7 F.3d 304, 309 (2d Cir. 1993) (a petitioner "must demonstrate that some plausible defense strategy or tactic might have been pursued.") (internal quotations omitted), cert. denied, 114 S. Ct. 1407 (1994); *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988) (a petitioner "must demonstrate that some plausible defense strategy or tactic might have been pursued."), cert. denied, 492 U.S. 906 (1989)."

The fact that an attorney not burdened by a conflict of interest might also have rejected a plea bargain or testimony by Defendant is not relevant. As the Court stated in *Perillo*:

> "The district court held that "Skelton's decision not to engage in impeachment or rigorous cross-examination of Fletcher at Perillo's trial was a reasonable trial strategy supported by sound professional judgment." However, this is the wrong legal standard. The proper question is whether some plausible defense strategy or tactic might have been pursued, but was not, because of the conflict of interest."

It is not necessary that the strategy not followed be the **best** strategy. If it was a **plausible** strategy,

that is enough. As the Court stated in *Perillo*:

> "We must remember that under *Cuyler* the issue is not what was the best strategy, but whether there was a plausible defense strategy that might have been pursued but was not, because of the conflict of interest. It is difficult to believe that impeaching the star state witness would not be a plausible defense strategy.
>
> Impeaching Fletcher was a plausible defense strategy, but Skelton's representation of her precluded him from adopting it. Instead, he chose the only strategy consistent with his dual representation of Fletcher and Perillo. Skelton's duty of loyalty to Fletcher stopped him from considering a strategy that involved aggressively attacking Fletcher's credibility. Skelton's plan of making Fletcher and Perillo appear sympathetic "was not a free choice of strategy. It was the only course open." *Foxworth v. Wainwright*, 516 F.2d 1072, 1079-80 (5th Cir. 1975)."

In this case, it is not necessary for Petitioner to show that a plea bargain or testimony implicating Gonzales was the only reasonable strategy. That is what Petitioner would have to do to show ineffective assistance of counsel regarding a lawyer who did not have a conflict of interest. *Strickland v. Washington*, supra. In a conflict situation, Petitioner need merely show that it was a plausible strategy.

We submit that where a Petitioner faces life in prison without parole when convicted, where the Petitioner has confessed to at least part of the criminal transaction, where there is police testimony and a tape from a concealed listening device corroborating major portions of the testimony of the informant, entering into a plea bargain deal for a 10 to 20 year sentence would be a plausible strategy for a reasonable attorney. We submit that in a conspiracy trial where a Petitioner admits to a drug transaction, but denies a conspiracy, having the Petitioner take the stand so he could testify to the absence of ongoing agreements would be a plausible strategy for a reasonable attorney.

However, attorney Ferrer had to rule out either of those reasonable strategies if he wanted to avoid angering his other client, Mr. Gonzales, and subjecting him to a possible conspiracy charge (in either Kent or Muskegon county) and life in prison.

Furthermore, the name of Mr. Gonzales came up frequently during the trial. Attorney Ferrer had numerous opportunities to decide what questions to ask witnesses, or not ask witnesses, about Mr. Gonzales. His decisions in this regard could not help but be affected by the interest of attorney Ferrer in protecting the interests of his other client.

An attorney is to vigorously act to advance the interests of his client, undeflected by conflicting

considerations. *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). As the Court noted in *People v. Shinkle*, 51 NY2d 17; 415 N.E.2d 909, 911 (1980), criminal defendants have "the right to both the fact and appearance of unswerving and exclusive loyalty on the part of attorneys who represent them."

In *Walberg v. Israel*, 766 F.2d 1071 (7th Cir. 1985), the Court granted Habeas Corpus relief based upon a conflict of interest, stating: "Although there is no proof that Clark pulled his punches at trial, he had every incentive to do so." Mr. Ferrer had every incentive to arrange the defense of Mr. Regelin in such a way as to avoid adverse consequences to Mr. Gonzales. He in fact did arrange Mr. Regelin's defense that way, by persuading him to reject a plea bargain that many attorneys would have strongly recommended, and by persuading him not to testify. Consistent with attorney Ferrer's need to minimize the exposure to his other client, Mr. Gonzales, attorney Ferrer consistently argued to Mr. Regelin's jury that Mr. Gonzales did not even exist.

There is no doubt that the situation of Mr. Ferrer, representing one defendant charged with conspiring with another client, where the second client was not being charged because only this defendant could testify against him, was "inherently conducive to divided loyalties." *Zuck v. State of Alabama*, supra.

Adverse effects have been found where the lawyer recommended or failed to recommend a plea bargain, where the action of the defendant in taking or rejecting a plea would reasonably be expected to have consequences for another client of the attorney. *Thomas v. Foltz*, supra; *Baty v. Balkcom*, supra; *United States v. Hall*, supra; *Serra v. Michigan Department of Corrections*, supra; *People v. Clark*, supra; *People v. Rhinehart*, supra; *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991). See also *Mannhalt v. Reed*, 847 F.2d 576 (9th Cir. 1988); *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987).

Under *Wood v. Georgia*, the mere possibility that the attorney may not have pursued the defendant's interest single-mindedly was enough to grant relief. The rulings below represent an erroneous and unreasonable application of United States Supreme Court case law.

D. Remedy.

In *United States v. Morrison*, 449 U.S. 361, 364; 101 S.Ct. 665; 66 L.Ed.2d 564 (1981), the Court stated the general rule regarding remedy for Sixth Amendment violations, U.S. Const., Amend. VI:

"Remedies for the deprivation of the

> Sixth Amendment right to the effective assistance of counsel 'should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'"

We are not asking for this Court to declare Petitioner Regelin innocent. We are asking for a remedy specifically tailored to undo the effect of the conflict of interest of counsel.

For the conflict of interest of counsel in the pretrial setting, the proper remedy would be to permit Petitioner to take the plea bargain offer that Mr. Ferrer's conflicted representation urged him not to take. Upon entering a plea, the trial-based conviction should be dismissed pursuant to that bargain.

Where counsel's unconstitutional performance causes the Defendant to lose an opportunity to make a plea bargain, the remedy would be to reinstate the opportunity to take the plea bargain. See *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981); *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991).

Prosecutor Fitz admitted that he does not talk directly to defendants, but presents all deal offers to the attorney. (T 2/1/2002, 80-81). This meant that attorney Pedro Ferrer was in charge of determining what Mr. Regelin would know, and when he would know it, and he was in a position to talk Mr. Regelin

out of any move that would tend to harm his other client José Gonzales. The document in Mr. Fitz's file, written by Mr. Fitz, showed a deal offer of 10 to 20 year, saying nothing about having to plead to anything in another county. (T 2/12/2002, 83, 93). Mr. Fitz agreed that if José Gonzales could have been charged and convicted in this case, he would have gotten life in prison. (T 2/1/2002, 88). Since David Love never dealt with Gonzales, only Petitioner Regelin could have made a Gonzales conviction happen, and attorney Ferrer was in a position to see that that not happen.

There are only 3 contemporaneous records of the plea offer. One of those is the Petitioner's Exhibit C, the handwritten note that Victor Fitz identified as being written by him. The note says "plea bargain offer (10-20)." .

The second contemporaneous record is the words of Petitioner Regelin in the sentencing transcript, where Mr. Regelin states the following to the Court:

> "That letter I wrote to you went into great detail regarding all the elements of this case; everything from entrapment issues to the plea bargain offers. You know, I mean it's like if they wanted me to serve life in prison, why did they offer me a ten to 20 plea bargain during this trial if that's what the Court wanted?" (Sent T, 12).

Mr. Regelin went on to say (Sent T, 16): "I mean, ten to 20 compared to life in prison? There's no – there's no comparison." He also said (Sent T, 18) "But mandatory life, when they offered me ten to 20, when they offered me to plead to 50, 225? Where's – where's the justice here?" Three times Petitioner described the plea offer in open court, and gave the same statement each time.

The third contemporaneous record is the words of Mr. Fitz at the sentencing hearing. After hearing Petitioner Regelin say at least 3 times that there was an offer for 10 to 20, Mr. Fitz went on for page after page criticizing Mr. Regelin's actions and his allocution. (Sent T, 18-27). Not once in those ten pages of comment did Mr. Fitz declare that Mr. Regelin was wrong. To the contrary, Mr. Fitz expressly agreed that Mr. Regelin was correct about the terms of the deal that was offered (Sent T, 20): "He was given an opportunity for a ten to 20, but the facts proved otherwise in this case."

Mr. Fitz's testimony, which was clear and positive in most respects, became halting and uncertain when he had to deal with the question of what about the supplement filed in Kent County. Mr. Fitz had no satisfactory explanation for where he would get the authority to dismiss a Kent County supplement. He had no satisfactory explanation for what value Petitioner would get for dismissing a life

sentence in Muskegon in exchange for a 10 to 20 consecutive with a Kent County life sentence. Ultimately, Mr. Fitz had to concede that he was not really sure about the details of this plea offer.

The 10 to 20 offer was testified to by Mr. Regelin at the evidentiary hearing. His evidentiary hearing testimony is completely consistent with what he told the Court 3 times at sentencing. In contrast, Mr. Fitz's testimony is not consistent with his handwritten note or with what he actually told the Court at sentencing in response to Mr. Regelin's comments about the 10 to 20 having been offered.

While present counsel is not privy to the bulk of prosecutions in Muskegon County, his experience as an attorney leads him to believe that plea bargain offers that involve tying up charges from two counties in a package deal are exceptionally rare, largely because of the lack of legal authority for a prosecutor in one county to deal a charge in another county. Also, where a deal in one county is contingent upon a deal in another county, there are too many possible intervening events that could, after the fact, retroactively undo the plea bargain because of actions in another county. It is not normal to take a plea bargain that is so uncertain as to its terms and that is so subject to later contingencies.

For the conflict of interest of counsel in the trial setting, the only proper remedy would be to grant a

new trial.

Petitioner submits that this Court should find that the conflict of interest of attorney Ferrer affected his representation, particularly in regard to plea bargaining, and in regard to dissuading attorney Ferrer from recommending that Petitioner Regelin offer testimony against Mr. Gonzales.

The conflict of interest of counsel deprived Petitioner of his opportunity to take a plea bargain without testimony, and his opportunity to try to secure a better deal by offering testimony. However, according to the hearing testimony, Mr. Gonzales is now dead. Mr. Regelin has nothing left to offer the Muskegon prosecutor where the supplier cannot now be prosecuted. To give Mr. Regelin only a new trial would not restore to him what was lost as a result of the conflict of interest of attorney Ferrer. See *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir. 1981); *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991).

While the defense submits that Petitioner Regelin could have gotten an even better deal than 10 to 20 in exchange for helping prosecute José Gonzales for drug conspiracy, the amount of that reduction would be somewhat speculative, while the 10 to 20 is concrete. [2] Petitioner submits that, at a minimum,

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[2] If this Court were to find that the plea offer

this Court should order that he be given the opportunity to enter a plea to conspiracy to deliver 50 to 225 grams with a sentence agreement of 10 to 20 years.

The violation of right to counsel is jurisdictional. This is not a question of the quality of performance of Attorney Ferrer. Mr. Ferrer should not have been the attorney at all being also the attorney for the named, but uncharged coconspirator José Gonzales, and for Petitioner Regelin. The United States Supreme Court holds the right to effective assistance of counsel to be so basic that every reasonable presumption would be indulged ***against*** waiver of this right. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

This Court should undo the injustice caused when attorney Ferrer decided to represent Petitioner Regelin while concealing from the Petitioner, the prosecutor, and the court his conflict of interest.

This Court should reverse the decision of the Circuit Court and grant Habeas Corpus relief, permitting Mr. Regelin to go back and take the deal

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required Petitioner to also take a plea to a crime charged in another county, that would certainly complicate the matter of the appropriate remedy, where the other crime is no longer charged, and where a prosecutor not party to this appeal would have to be involved.

and continue with the cooperation he was actively performing until attorney Ferrer persuaded him not to take actions that would harm Mr. Gonzales.

QUESTION 2: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); *People v. Pickens*, 446 Mich. 298 (1994); U.S. Const., Amend. VI. This right includes the right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821 (1985); *People v. Reed*, 449 Mich. 375 (1995); *Penson v. Ohio*, 488 U.S. 75; 109 S.Ct. 346; 102 L.Ed.2d 300 (1988).

In *Beasley v. United States*, supra, the Court stated that, to be constitutionally adequate:

> "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely manner."

Under *Evitts v. Lucey*, 469 U.S. at 396:

> "nominal representation on an appeal as of right--like nominal representation at

trial--does not suffice to render the proceedings constitutionally adequate."

The District Court rejected this issue, holding, first, that there appellate counsel was not ineffective and second, that :

"Petitioner also asserts as cause the fact that he did not understand that a conflict of interest could arise from defense counsel's relationship with Joe Gonzales so as to present the conflict of interest claim in his supplemental pleadings on direct appeal. The mere failure to recognize the factual or legal basis for a claim does not constitute cause for a procedural default. See *Murray v. Carrier*, 477 U.S. 478, 486 (1986). Further, the testimony at the evidentiary hearing established that Petitioner was well aware that defense counsel and Gonzales had a relationship that went "way back" and that counsel had represented Gonzales and his sons. While Petitioner may not have known of counsel's concurrent representation of Gonzales in Kent County (on an unrelated charge) until further investigation by counsel on collateral review, Petitioner possessed some knowledge of facts which could support a conflict of interest claim at the time of trial and direct appeal, but failed to pursue the matter." (Op, 18).

The District Court's ruling is inconsistent,

erroneous and unreasonable. If as the District Court ruled, the facts to support a conflict of interest claim were known at the time of trial or direct appeal, then appellate counsel was ineffective for not investigating and raising the issue. If on the other hand, there were not sufficient facts known at the time of the direct appeal, but further facts to support could have been available had appellate counsel conducted an investigation, then ineffective assistance of appellate counsel is established. *Beasley*, supra and *Evitts*, supra.

If the records of Kent County had been checked at the time of Petitioner's arrest it would have disclosed that Mr. Gonzalez in previous felony drug cases was represented by attorney Peter Walsh and attorney Charles Boekeloo, not attorney Ferrer (A25-26). Regarding José Gonzalez's then pending case for cocaine possession in Kent County, the records indicated that Gonzalez was represented by James M. Milanowski, not attorney Ferrer. It appears, in an effort to avoid detection about Ferrer's other client, José Gonzalez, information about that representation was suppressed and its filing delayed so as not to be noticed in Muskegon County. (A17).

The recent Sixth Circuit case of *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) is relevant. In that case, the appeal attorney filed a brief raising 7 issues, but failed to raise an issue the Sixth Circuit

found to be meritorious. On that basis, the Sixth Circuit found that there was ineffective assistance of appellate counsel.

Among the factors to be considered under *McFarland v. Yukins* were whether the omitted issues were "significant and obvious" and whether the omitted issues were "clearly stronger than those presented."

It is reasonably probable that Petitioner Regelin would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." Under *Mapes v. Coyle* and many other cases, a court may find ineffective assistance of appellate counsel from the failure to raise particular issues on appeal if the issues were obvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise these issues could have helped Mr. Regelin's appeal in any way.

Ineffective assistance of appellate counsel is "good cause" for failing to raise an issue in the appeal of right. *Edwards v. Carpenter*, 529 U.S. 446; 120 S.Ct. 1587; 146 L.Ed.2d 518 (2000); *Murray v. Carrier*, 477 U.S. 478, 488; 106 S.Ct. 2639; 91 L.Ed.2d 397 (1986); M.C.R. 6.508(D).

If the issues had been raised, the result of the appeal would unquestionably have been different. In this case, the issues not raised in the earlier appeal are highly meritorious and will change the result, if they can get consideration on their merits, and the failure to raise the issue constitutes ineffective assistance of appellate counsel. *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994); See, also, *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir.1991); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987).

While it is true that an attorney need not raise all arguable claims, it does not thereby follow that the attorney never need to raise any arguable claim. *McFarland v. Yukins*, supra. The state court rulings were incorrect and unreasonable. The District Court's rulings were incorrect and unreasonable.

This Court should reverse the Judgment of the District Court and grant Habeas Corpus relief, finding that Petitioner-Appellant was prejudiced by ineffective assistance of appellate counsel.

CONCLUSION

Petitioner Loren Regelin respectfully submits that for the reasons stated above, this Court should grant Certiorari and provide Habeas Corpus relief.

Respectfully submitted,

JAMES S. LAWRENCE P33664
Attorney for Petitioner Regelin
828 W. Eleven Mile Road
Royal Oak, MI 48067
(248) 399-6930
Dated: April 11, 2008

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOREN REGELIN,

Defendant-Appellant.

UNPUBLISHED
January 29, 1999
No. 203689
Muskegon Circuit Court
LC No. 96-139927 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for conspiracy to deliver 225 grams or more, but less than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1); MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and his enhanced sentences of twenty to forty-five years' imprisonment as a second habitual offender under MCL 769.10; MSA 28.1082, and of life imprisonment without parole as a repeat drug offender under MCL 333.7413(1); MSA 14.15(7413)(1). We vacate defendant's twenty to forty-five year sentence, but affirm his conviction and life sentence.

We have viewed the evidence in a light most favorable to the prosecutor and conclude that a rational trier of fact could find beyond a reasonable doubt that defendant was part of a "chain" conspiracy, with defendant's supplier, defendant, David Love, and John Workman sharing knowledge that the cocaine was being delivered for ultimate consumption by street users and agreeing to provide cocaine at various links along the chain to further this goal. *People v Justice (After Remand)*, 454 Mich 334, 345-347, 355; 562 NW2d 652 (1997); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v Porterfield*, 128 Mich App 35, 41; 339 NW2d 683 (1983); *People v Missouri*, 100 Mich App 310, 343; 299 NW2d 346 (1980). Additionally, because the evidence supports an inference that the multiple deliveries of lesser amounts of cocaine were part of an ongoing criminal enterprise designed to distribute a significant amount of cocaine to street users for profit, these multiple transactions could be aggregated to establish the existence of the charged conspiracy. *Porterfield, supra.*

Defendant failed to preserve his claims of prosecutorial misconduct for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). Accordingly, we will

reverse only if a curative instruction could not have eliminated the prejudicial effect of the alleged misconduct or where a miscarriage of justice will result from our failure to grant the relief requested. *Messenger, supra* at 179-180.

Defendant correctly points out that the prosecutor made remarks during his opening statement that were not substantiated at trial by the evidence presented. When a prosecutor makes statements in his opening statement that are not substantiated at trial by evidence, we will not reverse for that fact alone in the absence of a showing of bad faith or prejudice to the defendant. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). In the instant case, the record does not suggest that the prosecutor did not believe that his statements would be proven at trial. Thus, the prosecutor did not act in bad faith when he made the subsequent unproved statements. Moreover, defendant suffered no prejudice from the statements where they were briefly made as part of a lengthy opening statement on the first day of a four-day trial and where the identity of defendant's source need not have been known to Love to convict defendant of the charged conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 412, 415; 531 NW2d 749 (1995).

Contrary to defendant's argument, the prosecutor did not inject into evidence the fact that

defendant met his supplier while both were imprisoned. Instead, Love volunteered this information with a non-responsive answer to an otherwise proper question posed by the prosecutor. The non- responsive answer does not justify reversal, see, e.g., *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992); *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988), especially where the prosecutor quickly refocused Love's attention away from the imprisonment reference and any prejudice arising from the mention of defendant's former imprisonment could have been cured by a timely objection and instruction by the judge, *Messenger, supra*.

Defendant also failed to preserve for appellate review his challenge to the instructions to the jury. *People v Maleski*, 220 Mich App 518, 520-521; 560 NW2d 71 (1996). Consequently, we will reverse only if manifest injustice will result from our failure to grant the requested relief. *Id.* at 521. In the instant case, because the instructions concerning the aggregation of amounts of cocaine delivered in multiple transactions were legally accurate, *Justice, supra* at 355; *People v Atley*, 392 Mich 298, 311- 312; 220 NW2d 465 (1974); *Porterfield, supra* at 41, and, therefore, sufficient to protect defendant's interests, *People v Zak*, 184 Mich App 1, 15; 457 NW2d 59 (1990), manifest injustice will not result from our

failure to grant the requested relief.

We decline appellate review of defendant's claim that the trial court should have sua sponte instructed the jury in accordance with CJI2d 5.6. Defendant may not now complain where he specifically asked that this instruction not be given. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

We reject defendant's challenge to the constitutionality of the provision in MCL 333.7413(1); MSA 14.15(7413)(1), which authorizes the imposition of a sentence of mandatory life without parole. *People v Fole*, 218 Mich App 702, 715-717; 555 NW2d 485 (1996).

We also reject defendant's claim that the trial court had the discretion to sentence him under the habitual offender statutes where the prosecutor sought sentence enhancement pursuant to MCL 333.7413(1); MSA 14.15(7413)(1). The Legislature vested with the prosecutor the discretion to proceed under the statute that would impose the greatest punishment. *People v Sears*, 124 Mich App 735, 742; 336 NW2d 210 (1983). When the trial court sentenced defendant as an habitual offender, in the face of the prosecutor's request to sentence defendant pursuant to § 7413(1), the court usurped the prosecutor's discretion to choose the statutory provision under which defendant's sentence was to be enhanced. *Sears, supra*. Accordingly, we vacate

defendant's twenty to forty-five year sentence and remand for entry of an amended judgment of sentence.

Defendant argues that the Muskegon County courts lacked subject matter and personal jurisdiction to issue an arrest warrant in this case and to try, convict, and sentence him. Defendant has confused the concept of jurisdiction with the concept of venue. For example, defendant asserts that the Muskegon County courts lacked subject matter jurisdiction because no criminal act was committed in Muskegon County. Subject matter jurisdiction is the right of the court to exercise jurisdiction over a particular class of cases, such as criminal cases, and not the particular case before it. *People v Goecke*, 457 Mich 442, 458 & n 15; 579 NW2d 868 (1998). A challenge to the right of a court to try a particular case before it based on the assertion that no criminal act occurred within the prosecuting jurisdiction is a challenge to venue. *Meredith, supra* at 407-409. Accordingly, the issue raised by defendant is not whether the Muskegon County courts had jurisdiction, but whether venue was properly laid in Muskegon County.

Defendant failed to preserve his venue challenge for appellate review. *People v Williams*, 1 Mich App 441, 443; 136 NW2d 774 (1965). Nevertheless, we conclude that the Muskegon County courts had venue

in this matter. A conspiracy charge can be prosecuted in any jurisdiction in which an overt act occurred in furtherance of the conspiracy. *Meredith, supra* at 408. On the instant record, several overt acts occurred in Muskegon County. Specifically, defendant first asked Love to become involved in the cocaine "business" at a bar in Muskegon County. Love agreed to become involved in the "business" at that same bar. Additionally, some of the cocaine was delivered by defendant to Love and by Love to third parties in Muskegon County. Other overt acts include arranging for Love to drive defendant to Grand Rapids to secure cocaine from defendant's supplier and Love paying defendant for the cocaine defendant fronted Love. Because numerous overt acts in furtherance of the conspiracy occurred in Muskegon County, the conspiracy charge was properly prosecuted in Muskegon County.

The trial court did not abuse its discretion when it permitted the prosecutor to amend the information. *People v Coles*, 28 Mich App 300, 302; 184 NW2d 214 (1970). With regard to the amendment including within the scope of the conspiracy the events of July 29, 1996, defendant correctly points out that Love could not be a coconspirator as of July 29, 1996, because he was a police informant feigning participation in the criminal enterprise. *Atley, supra* at 311-312. This

does not mean, however, as defendant asserts, that Love could not testify about the events transpiring on July 29, or that such testimony could not be used to show that defendant and his supplier were engaged in an ongoing conspiracy to deliver cocaine to third parties for ultimate distribution to street users. *Id.* at 312 n 1. Love's preliminary examination testimony regarding the events of July 29, which substantially parallels his trial testimony, established not just a mere buyer-seller relationship between defendant and his supplier, but established that the July 29th transaction between defendant and his supplier was part of the ongoing agreement between defendant and his supplier to supply third parties in a distribution chain with significant amounts of cocaine for delivery to street users – a conspiracy in which Love was involved from December 1995 to March 1996. Under these circumstances, amending the information merely brought the information into conformity with the evidence offered at the preliminary examination and reiterated what was already known to defendant. MCL 767.76; MSA 28.1016; *People v Weathersby*, 204 Mich App 98, 103-104; 514 NW2d 493 (1994); *People v Fortson*, 202 Mich App 13, 15-16; 507 NW2d 763 (1993).

With regard to amending the information to identify John Workman as a coconspirator, defendant correctly points out that no mention of Workman

appears in the preliminary examination record. The trial testimony established, however, that Workman acted in furtherance of the conspiracy by receiving cocaine from defendant, which defendant received from his supplier, in amounts sufficient to infer that Workman was purchasing the cocaine for the ultimate goal of consumption by street users. Under such circumstances, the amendment did not result in the charging of a new conspiracy offense, but merely resulted in the information charging the offense with greater specificity. *Weathersby, supra* at 104.

Moreover, neither amendment subjected defendant to surprise or prejudice where evidence of the conspiracy between defendant and his supplier to deliver cocaine to third persons for the ultimate consumption of street users was presented at the preliminary examination, where the prosecutor was ordered to supply defendant with all police and surveillance reports concerning the charged conspiracy, and where trial did not take place until April 8, 1997, some 2-1/2 months after the information was amended, thereby permitting defendant ample time to prepare his defense. *Fortson, supra.* Further, because the amendments did not result in the charging of new offenses for which no support was offered at the preliminary examination, defendant was not entitled to a second preliminary examination before the information

could be amended. *Weathersby, supra.*

In the absence of an evidentiary hearing, the record fails to demonstrate either that defense counsel rendered constitutionally deficient assistance during trial or that defendant suffered the requisite prejudice to sustain his ineffective assistance of counsel claims. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *Messenger, supra* at 181-182; *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant's conviction and life sentence are both affirmed, the twenty to forty-five year habitual offender sentence is vacated, and the case is remanded for entry of a corrected judgment of sentence.

We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

AFFIDAVIT OF LOREN REGELIN

I, Loren Regelin, being first duly sworn, do say and depose as follows:

1. I was the Defendant in *People v Loren Regelin,* Muskegon County Circuit Court Case No. 96-1-39927-FH. I was convicted of conspiracy to deliver from 225 to 650 grams of cocaine, and sentenced to life in prison as a second drug offender. Defense counsel was Pedro Ferrer.

2. The District Judge had ruled that the events of July 29, 1996 were not part of the conspiracy being bound over. A pretrial ruling was made in Circuit Court that the Information could be amended to add those events. Mr. Ferrer promised me that he would file an interlocutory appeal from the pretrial ruling of January 27,1997, that amended the Information to add charges dismissed by the District Judge. He failed to do so. He did not tell me that he intended to break his promise and not appeal. He had plenty of time to file the appeal, because trial did not start until April 8, 1997.

3. Mr. Ferrer told me that if I was convicted the judge could sentence me up to life in prison, but that it was discretionary, and the judge would probably give me less. I later learned that the life sentence was mandatory. If I had known that a life sentence was mandatory, I would have accepted the plea bargain

offer from the prosecutor to take 10 to 20 years.

4. During the trial there was a discussion of whether I should testify. Mr. Ferrer told me that if I did testify, the prosecutor would harm my case by introducing evidence about my prior conviction for delivery of cocaine from 50 to 225 grams. If I had known that the prosecutor could not do that, I would have testified.

5. During the time he represented me, Mr. Ferrer informed me of a plea bargain offer for me to serve 10 to 20 years, but he urged me to reject it. He also urged me to not testify.

SEAL /s/

_____

LOREN REGELIN
Date of Birth December 17, 1961
Address 17601 Mound Rd.
Detroit, MI 48212

Subscribed and sworn to before me this date October 10, 2000.

SEAL /s/ _____

Notary Public, Wayne County, MI
My commission expires: March 28, 2001

FELONY INFORMATION **A13**

STATE OF MICHIGAN Case No.

Judicial District INFORMATION District 96-61747

Judicial Circuit FELONY Circuit 96-1-39927

THE PEOPLE OF THE STATE OF MICHIGAN v LOREN REGELIN

4911White Rd.

Muskegon, MI

Complaining witness

Det. Baker MPNU

Co-defendant(s)

Date: On or about July 29, 1995 Location: Kent County; 68th and Division Conspire Del 0/225 Grams Cocaine: DBL PEN: Supp 2nd

STATE OF MICHIGAN, COUNTY OF MUSKEGON IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: The prosecuting attorney for this County appears before the court and informs the court that on the date and at the location described, the defendant:

did unlawfully conspire, combine, confederate and agree together with José Gonzales, David Love, Gerald Magnuson, Thomas Nutt, Raymond Alexander and Brad Botbyle to deliver 225 grams or more but less than 650 grams of a mixture containing the controlled substance cocaine contrary to MCL 333.7401(2)(a)(ii); MSA 14.15 (2)(a)(ii) CONSPIRACY-CONTROLLED SUBSTANCE-DELIVERY/ MANUFACTURE (NARCOTIC OR COCAINE) 225 TO 649 BRAMS (333.74012A21(C) FELONY: 20-30 Years. The court may depart from

the minimum if it finds on the record that there are substantial and compelling reasons to do so. And it further appearing on 12/9/87, said defendant was previously convicted of Delivery/Manufacture 0/50 but less than u/225 grams Cocaine in the 14th Circuit;

Therefore, the offense set forth above is alleged to a second offense; contrary to MCL 333.7413(1); MSA 14.15(7413). CONTROLLED SUBSTANCES-SECOND OFFENSE- LIFE (333.741311) FELONY: Mandatory Life.

NOTICE OF INTENT TO SEEK ENHANCED SENTENCE Take notice that the defendant was previously convicted of a felony or an attempt to commit a felony in that on or about 12/9/87, he or she was convicted of the offense of Delivery/manufacture 0/50 But Less Than U/225 grams Cocaine, in the county of Muskegon, 5tate of Michigan.

Therefore, defendant is subject to the penalties provided by MCL 763.10; MSA 28.1082. HABITUAL OFFENDER - SECOND OFFENSE NOTICE [769.10]

PENALTY: One and one-half times the maximum sentence on primary offense or lesser term. and against the peace and dignity of the State of Michigan.

Prosecuting Attorney

NOVEMBER 4, 1996 By SEAL /s/

Tony Tague P 36226

STATE OF MICHIGAN
IN THE 61ST JUDICIAL DISTRICT COURT
FOR COUNTY OF KENT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

Case No: 96-FY-330
vs. Hon.

JOSÉ GONZALES,

Defendant. STIPULATION & ORDER ON SUBSTITUTION OF ATTORNEY

James M. Milanowski (P24433)
Attorney for Defendant
900 McKay Tower
146 Monroe Center
Grand Rapids, MI 49503
616/774-8181

Pedro Serrano (P37269)
152 McKay Tower
146 Monroe Ave N.W
Grand Rapids, MI 49503
616/776-3586

NOW COMES the above-named Defendant, by

his proposed attorney of record, Pedro Ferrer, and by his present attorney of record, James M. Milanowski, and the parties hereby stipulate and agree that Pedro Ferrer may be substituted in the place of James M. Milanoski.

Dated: 1-12-96

Seal
James M. Milanowski
Attorney of Record

Dated: 1-12-96

Seal
Pedro Ferrer (P37269)
Substituting Attorney

At a session of said Court held in the City Grand Rapids. County and State aforesaid, on this 12th day of March 1996.

PRESENT: HONORABLE David J. Buter
District Court Judge

This matter having come before the Court on the stipulation to the parties, requesting that Attorney James M. Milanowski, be permitted to withdraw as attorney of record for the Defendant José Gonzales, and that Pedro Ferrer be permitted to substitute as attorney of record for Mr. José Gonzales.

IT IS HEREBY ORDERED that Pedro Ferrer shall be the attorney of record for the Defendant José Gonzales, effective this 12th day of March 1996.

SEAL

_____

District Court Judge

Countersigned:

Seal

Deputy Clerk

Attested: A TRUE COPY

Deputy Clerk

GONZALEZ FELONY COMP **A18**

THE PEOPLE OF THE STATE OF MICHIGAN

OFFENSE INFORMATION

V. Date: 02/11/96 Agency No

JOSÉ I. GONZALEZ 703 Ball NE Grand Rapids

Defendant Complaining Witness

ROBERT STANTON

Charge(s) Victim(s) or Complainant(s) POSSCOCL/25GRAMS GREG GRIFFIN

Witnesses

ROBERTSTANTON GREGGRIFFIN LAB AGENT BARRON SIGNS MARK MORTON

STATE OF MICHIGAN, COUNTY OF KENT

The complaining witness says that on the date and at the location stated above, the Defendant(s), contrary to law

CT 1 JOSÉ I. GONZALES did knowingly or intentionally possess less than 25 grams of a mixture containing the controlled substance COCAINE; contrary to MCL 333.7403(2)(a)(v): MSA 14.15(7403). FELONY: 4 Years and/or $25,000.00 [333.74032A5]

GONZALEZ FELONY COMP **A19**

The complaining witness asks that Defendant(s) be apprehended and dealt with according to law.

SEAL /s/

Complaining witness signature Warrant authorized on 2/11/96 by

SEAL /s/ Subscribed and sworn to before Prosecuting Attorney me on 2-11-96

SEAL /s/

District Judge/Magistrate signature

GONZALEZ CASE REPORT **A20**

KENT COUNTY COURT SERVICES
Hall Of Justice, Room #302
333 Monroe Ave.. N.W.
Grand Rapids MI 49503

(616) 336-3990

02-11-1996 COURTS #: 61st REPORT ON CASE-*:
9 6 0 2 3 0 4 Page 1:
NAME: José Ignacio Gonzales Sr. Id#: 449726854

DATE OF BIRTH : 11 -01-1944 AGE: 46 SEX: M
R A C E Hispanic
PLACE OF BIRTH: Mission, TX SSN : 449-72-6854

ALIASES:

J o e G o n z a l e s
J o s e I g n a s Q o n z a l e s
J o s e I g n a s G o n z a l e z
José InlanGonzales
J o d Qonzales
José Ignacio De Anda Gonzales

CHARGES FOR CASE# 9602304 BOND

P o s Cocaine
OUIL

Total Bond: $O

FAMILY DATA

GONZALEZ CASE REPORT **A21**

MARITAL STATUS: Divorced # OF DEPENDENT CHILDREN: 00

—MOTHER FATHER ——

NAME: Maria Gonzales Camillo Gonzales
ADDR: Mission. Texas Mission, Texas

DEFENDANT REMARKS:

The def has 2 sons and a daughter living in GR.

FAMILY DATA VERIFIED BY: Prior Court Service Report RELATION:

LAST SCHOOL ATTENDED:

CITY/STATE OF SCHOOL YRS COMPLETED: 06

GONZALEZ 1995 CONVICTION **A22**

STATE OF MICHIGAN CASE NUMBER

17TH JUDICIAL CIRCUIT 94-174-FH

JUDGMENT OF SENTENCE

333 MONROE NW GRAND RAPIDS, MI 49503

PEOPLE of State of MI v José Ignacio Gonzales

THE COURT FINDS

1. The Defendant was found guilty on 2/7/95 of the crime(s) as stated below

Count	Plea	Court Jury	Crime	Charge Code
	X		Maintaining a Drug House	733.7405E
	X		Possession Marijuana	333.74032D

Defendant represented by an attorney Charles Boekeloo

IT IS ORDERED

Date Sentence Begins	Sentenced Mos	Sentenced Day	Credited To Be Served Mos. Days	To Be Served Mos. Days
3/6/95	10		264	

3/6/95 Seal /s/

James C. Kolenda

GONZALEZ 1992 CONVICTION **A23**

STATE OF MICHIGAN CASE NUMBER

17TH JUDICIAL CIRCUIT 91-54132-FH

JUDGMENT OF SENTENCE

333 MONROE NW GRAND RAPIDS, MI 49503

PEOPLE of State of MI v José Ignacio Gonzales

Prosecuting Attorney	Defendant Attorney name
Richard Ward	Peter Walsh

THE COURT FINDS

1. The Defendant represented by counsel was found guilty on 10/2191 of the crime(s) as stated below

Count	Plea	Court	Jury	Crime	Charge Code
G				Pos w/i Del Marijuana	333.74012C

IT IS ORDERED

Sentence Date	Minimum yrs	mos	days	Maximum yrs	mos	Begin Jail	Credit mos	days
1/16/92	2	0	0	4	0	1/16/92		2

1/16/92 Seal /s/

Michael R. Smolenski

GONZALEZ PLEA AGREEMENT **A24**

STATE OF MICHIGAN

THE CIRCUIT COURT FOR THE COUNTY OF KENT

The People of the State of Michigan, Case: 91-54132-FH Charge: POSS W/I DEL MARIJUANA

vs

RECORD OF PLEA OF GUILTY TO THE 1ST COUNT OF THE INFORMATION

JOSÉ IGNACIO GONZALES SR

_____/ BOND CONTINUED

At a session of said Court, held at the Hall of Justice, in the City of Grand Rapids, in said County, on the 21st day of October, 1991.

Present: Honorable Michael R. Smolenski,
Circuit Judge

The respondent in this cause, José Ignacio Gonzales Sr., now appearing in open Court with his/her counsel, Peter Walsh, and upon being re-arraigned at the Bar thereof, the reading of the information was thereupon had as to the 1st count, whereupon the said respondent entered a plea of

GUILTY as charged,

WHEREUPON, IT IS ORDERED that the plea of GUILTY, as now made to the 1st count in the information, be entered by the Court Clerk,

THEREFORE, IT IS ORDERED that sentence be and hereby is deferred until a pre-sentence investigation report is completed by the Probation Officer for the County of Kent,

AND, IT IS FURTHER ORDERED, that the said respondent's Appearance Bond heretofore given be and the same is hereby continued until the further Order of the Court.

PLEA BARGAIN: P.A. will dismiss Ct *2,* SUPP 2/DRUG, SUPP 4 and Case No. 91-54754-FH. Defendant to receive hearing on previous plea-bargain.

Examined, Countersigned & Entered

SEAL _____ SEAL _____

Deputy County Clerk Circuit Judge

RECD & FILED
OCT 2.1 1991
KENT COUNTY CLERK ENTERED
JOURNAL No. 921 Page 837

EXHIBIT C PLEA DISCUSSION **A26**

DEFENDANT'S EXHIBIT C 2-1-02 MMM

David love
- 9 month -> many others
- was dealing w/ Reglien

his own life
kids life
neighborhood

Date Dictated: August 16, 1993

- plea bargain offer (10-20)

UPDATE Sentence Date: August 30, 1993

safer economy suffers violence

people suffer people's lives shatterd

people die where justice?

unlike murder which physly ??? life, this D destroys

-own confession
-dealing for a year

OF MICHIGAN
14TH CASE NO
IT COURT REGELIN, LOREN DALE 87-29209-FH

-never asked for us to extend it again

DISTRIBRUTION: HONORABLE R. MAX DANIELS

SUMMARY OF SETNENCE: -sour grapes now guilty

-chess game - lose game collect the stakes

The defendant was sentenced on 12/9/87, to 10-20 years in prison for the crime of delivery of a controlled substance over 50 grams. A re-sentencing occurred on 4/22/91, and the defendant was again sentenced to prison for 10-20 years.

SUMMARY OF ADJUSTMENT:

This court is directed to the attached presentence report and update for information prior to the defendant's last sentence. Regelin is currently housed at the Brooks Regional

Correctional Facility. According to prison counselor, John Kemme, subject is a, "model prisoner". He has not received any misconduct tickets while in prison. For the past year, he has been the unit's librarian and has done an excellent job. Regelin also complete a 13 week drug awareness program and received a certificate. The counselor also advised me that Regelin had applied to be placed at the Muskegon Correction Center. Attached also are letters sent by the defendant.

RECOMMENDATION:

There appears to be a question as to the possible minimum sentence for this defendant. I can only recommend that the subject be placed with the Michigan Department of Corrections, however, his exemplary behavior is noted.

PRISON CREDIT TIME:

Two thousand two hundred twenty-one days.

Respectfully submitted,

/s/ SEAL

Cynthia M. Shyne
Probation Agent
CMS/sn
Transcript: 8/17/93
TX: 616 724 6345

TRIAL COURT OPINION **A28**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

THE PEOPLE OF THE
STATE OF MICHIGAN,

vs. HON. WILLIAM C. MARIETTI
Case No. 96-1-39927-FH

LOREN REGELIN,

Defendant. / OPINION

TONIYA GUY (P56226)
Prosecuting Attorney

JAMES TERLINCA WRENCE (P33664)
Attorney for Defendant

At a session of said Court held in the Hall of Justice, in the city of Muskegon, county and state aforesaid on the 26th day of February, 2002.

PRESENT: HONORABLE WILLIAM C. MARIETTI Circuit Judge

The Court conducted an evidentiary hearing to determine whether defendant was deprived of effective assistance of counsel due to his trial

attorney's alleged conflict of interest. Since this was a motion for relief from judgment based upon an issue that could have been addressed in defendant's appeal of right, he must establish good cause for failure to raise the issue previously and actual prejudice. See, People v Boswell, slip op. 228359 (11/16/01). Because the defendant was convicted following a trial, to show the requisite prejudice he must establish that. but for the alleged defect, there is a reasonably likely chance that he would have been acquitted. For purposes of this motion, the Court will assume that everything defendant testified to, except the details of a plea bargain, is true.

Defendant contends that the conflict of interest caused his attorney to advise him to refrain from testifying at the trial. Defendant has failed to demonstrate that his testimony would have generated a reasonably likely chance of acquittal.

Defendant also contends that his counsel advised against a plea bargain as a result of the alleged conflict. Defendant maintains that he was willing to plead to a reduced charge that carried a ten year sentence. The problem with his argument is that both the Prosecutor and his attorney testified that no such plea bargain was ever offered by the People. The only offer extended by the Prosecutor was to have defendant plead to a reduced charge in this case and a similar charge in Kent County. This would have

resulted in two consecutive ten year sentences which defendant was unwilling to agree to. Again, no actual prejudice has been shown.

Defendant also argues that he may have been able to extract a better offer from the People had his attorney advised the Prosecutor he was willing to implicate Gonzales as his supplier.

The defendant was aware that the prosecution was interested in pursuing his supplier at the time he was arrested. Defendant declined to satisfy the prosecution's curiosity at that stage. By the time of trial, the prosecutor testified there was a possibility that he may have remained interested but experience had shown the lapse of time would make it difficult to successfully prosecute a supplier. This mere possibility is not sufficient proof of actual prejudice.

Nor is the Court convinced that defendant has shown good cause for failure to raise the issue previously. Defendant testified that when he retained his trial counsel he was made aware of the fact that the attorney was acquainted with José Gonzales, that "they go way back" and that he had represented Gonzales and his sons. Defendant had this information from the beginning of his relationship with his attorney. He elected not to protest this until after he had been tried, convicted and unsuccessfully appealed. It would be a gross miscarriage of Justice to allow the defendant to sit back with this

knowledge, see how successful he is at the various levels of the process and then assert his claim of conflict when the case doesn't turn out as he wished. This is precisely why MCR 6.508 imposes a good cause threshold.

SEAL

Hon. William C. Marietti

STATE OF MICHIGAN

IN THE MUSKEGON COUNTY CIRCUIT COURT

PEOPLE OP THE STATE OF MICHIGAN,
Plaintiff,

-v- Case No. 96-139927-FH

LOREN REGELIN, HON. WILLIAM C.
Defendant. MARIETTI

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

At a session of the Court at the Muskegon County Courthouse, Muskegon, Michigan, held 2-28-03.

PRESENT: THE HON. WILLIAM C. MARIETTI

The Defendant having filed a Motion for Relief from Judgment, and the Court having considered the matter and having previously is sued an Opinion;

IT IS ORDERED that for reasons stated in the Opinion dated February 26, 2002, the Defendant's Motion for Relief from Judgment is hereby DENIED.

SEAL

HON. WILLIAM C. MARIETTI
Circuit Court Judge

Court of Appeals, State of Michigan

ORDER William B. Murphy
Presiding Judge

People of MI v LOREN REGELIN

Docket No. 247239 Janet T. Neff

LC No. 96-139927-FH Jane E. Markey
Judges

The Court orders that the application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

[SEAL]
Date JUN 02, 2003 /s/ Sandra Schultz Mengel
Chief Clerk

Order **Michigan Supreme Court**

Entered: November 24, 2003 **Lansing, Michigan**

124263

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LOREN REGELIN,
Defendant-Appellant.
_____/

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 124263
COA:247239
Muskegon CC: 96-139927-FH

On order of the Court, the application for leave to appeal the June 2, 2003 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

November 29, 2007

/s/ Corbin R. Davis
Clerk

Order **Michigan Supreme Court**

Entered: February 27, 2004 **Lansing, Michigan**

124263

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LOREN REGELIN,
Defendant-Appellant.
_____/

Maura D. Corrigan
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 124263
COA:247239
Muskegon CC: 96-139927-FH

On order of the Court, the motion for reconsideration of this Court's order of November 24, 2003 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

February 27, 2004 /s/ Corbin R. Davis
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOREN REGELIN,

Petitioner,

CASE NO. 04-CV-70814-DT

v. HON. BERNARD A. FRIEDMAN

ANDREW JACKSON,

Respondent.

_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Loren Regelin ("Petitioner"), a state prisoner currently confined at the Carson City Correctional Facility in Carson City, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that he is being held in violation of his constitutional rights.1 Petitioner was convicted of conspiracy to deliver more than 225 grams but less than 650 grams of cocaine, *see* Mich. Comp. L. §§ 750.157a; 333.7401(2)(a)(ii), following a jury trial in the Muskegon County Circuit Court in 1997. He was sentenced to life imprisonment as a repeat drug offender. *See* Mich. Comp. L. § 333.7413(1).

1At the time he instituted this action, Petitioner was confined at the Macomb Correctional Facility in New Haven, Michigan.

In his pleadings, Petitioner raises claims alleging a conflict of interest by trial counsel, insufficient evidence of conspiracy, improper jury instructions, and ineffective assistance of trial and appellate counsel. For the reasons set forth below, the Court denies the petition for writ of habeas corpus.

II. Facts and Procedural History

Petitioner's convictions stem from his actions in conspiring to deliver more than 225 grams but less than 650 grams of cocaine in Muskegon County, Michigan in 1995 and 1996. Named but unindicted co-conspirators included Joe or José Gonzales, David Love, John Workman, Gerald Magnusen, Thomas Nutt, Raymond Alexander, and Brad Botbyl.

At trial, one of the main prosecution witnesses was David Love, an associate of Petitioner's who turned informant following his own arrest on drug charges on July 25, 1996. David Love testified pursuant to a plea agreement in which he pleaded guilty to cocaine possession and agreed to cooperate with the authorities and the prosecution agreed not to charge him as a habitual offender and granted him immunity for drug activity prior to July, 1996. Love admitted that he had pleaded guilty to prior drug charges, cooperated with the authorities, and served time in jail.

Love testified that he knew Petitioner for 15

years but had not seen him for a time before running into him at area bars in 1995. Petitioner asked Love if he wanted to get back into the drug business. Love initially declined because he was married and had kids. Following a divorce, Love changed his mind and told Petitioner that he was interested in buying and selling cocaine. Love did not use cocaine with Petitioner, but wanted to make money from sales. Love and Petitioner exchanged phone numbers in November, 1995. Love received cocaine from Petitioner in December, 1995. At that time, Love met with Petitioner in his apartment and they discussed their arrangement. Petitioner said that he would front the cocaine to Love who would pay him after he sold it. Petitioner told Love that he wanted to make money from the cocaine sales. They also discussed who was going to help Love sell the cocaine and Love mentioned Gerald Magnuson in particular.

Love testified that he went to Grand Rapids with Petitioner one day in December, 1995. They stopped at a phone booth where Petitioner made a call to make sure that the cocaine was available. They then drove to a bar called My Place and waited in the parking lot. Another vehicle pulled up and Petitioner got into that vehicle and left. Petitioner returned a few minutes later, got back into Love's car, and they left to drive back to Muskegon. When they had driven a few blocks, Petitioner asked Love to pull

over, took out the cocaine, and used about 1/4 of a gram. Love indicated that a heavy user would use two 8-balls (six to eight grams or 1/4 of an ounce) a week. When they arrived in Muskegon, Petitioner gave Love one ounce and kept two ounces. Love returned to Grand Rapids with Petitioner in January, 1996 and a similar series of events unfolded. Love received two ounces of cocaine on that occasion.

Love continued to receive cocaine from Petitioner over the next several months. Love was not using cocaine, just selling it to buyers, including Gerald Magnuson, Tom Nutt, Greg Schwing, Ray Alexander, and Brad Botbyl. Love fronted cocaine to Magnuson, sold and fronted cocaine to Nutt and Schwing, and sold cocaine to Alexander and Botbyl. He sold 1/2 ounce to Magnuson 10 times, 1/2 ounce to Nutt eight times, 3 1/2 grams once or twice to Alexander, 8-balls to Botbyl once or twice, and two or three 8-balls to Schwing 10 times.

Love recalled that Petitioner dropped off cocaine at Love's apartment on one occasion toward the end of January, 1996. Love also received cocaine from Petitioner at a nearby Eleven. On most occasions, Love received two ounces of cocaine from Petitioner. Love stated that he received three ounces from Petitioner in March, 1996. Love also testified that he received from Petitioner while they were at the Someplace Else restaurant in February or March,

1996. Petitioner made a few telephone calls, met with someone who pulled up in the parking lot, and subsequently gave Love two ounces of cocaine, while keeping approximately four to five ounces of cocaine. Petitioner fronted Love the cocaine on each occasion. Once Love sold the cocaine, Love paid Petitioner $1,400 an ounce. Love had to be paid up on the last transaction before Petitioner would arrange another one.

Love testified that Petitioner had told him that his cocaine source was a man he met in prison named Joe Gonzales who lived in Grand Rapids. Petitioner told him that he was also supplying John Workman and Chris Crowell with cocaine and that he occasionally sold an ounce to Workman.

In March, 1996, Love switched suppliers because he was able to get cocaine for $1,000 an ounce from Greg Schwing who was buying from a source in Holland, Michigan. Petitioner contacted him once or twice to try to sell him cocaine, but Love refused. Love was arrested in July, 1996 carrying over $700 and an 8-ball of cocaine he had purchased from Schwing. He agreed to cooperate with the authorities and set up a drug buy from Petitioner.

David Love subsequently contacted Petitioner about purchasing more cocaine. On July 29, 1996, he met Petitioner at his shop and Petitioner told him to call at 4:00 p.m. Love and Petitioner exchanged

telephone calls that afternoon and Petitioner said that he was unable to reach his supplier, but they agreed to meet at Morrow's restaurant and drive in separate cars to Grand Rapids. The calls were recorded by police. The police subsequently searched Love and his car, outfitted him with a recording device, and gave him $5,300 to buy four ounces of cocaine. Love then drove to Morrow's restaurant, waited for Petitioner, and followed him to Grand Rapids. They stopped at a 7-Eleven and Petitioner left to speak with his supplier. When Petitioner returned, he said that his supplier had one ounce and that he could get three more ounces if Love waited. Petitioner left again and returned 10 or 15 minutes later. Love then followed Petitioner to a nearby gas station, they drove around together for awhile, then Petitioner made a call and left again by himself. When Petitioner returned, Love followed him to an apartment complex. Love gave Petitioner money to buy the cocaine. Petitioner went into the apartment complex, returned with the cocaine in a large bag, gave it to Love, and left. Love turned the cocaine over to the police. A tape of recorded conversation between Love and Petitioner regarding the terms of the drug buy was played for the jury at trial.

Several police officers also testified regarding the circumstances of David Love's arrest and his subsequent cooperation with the police, the

surveillance of Petitioner and Love, and the July 29, 1996 drug buy.

Muskegon Police Detective Ken Wansten testified about the investigation and arrest of Petitioner. He explained that Petitioner was not arrested until October 9, 1996 because David Love was assisting with other investigations. Detective Wansten testified that he read Petitioner his *Miranda* rights and interviewed him after his arrest. Petitioner admitted delivering four ounces of cocaine to David Love in Grand Rapids on July 29, 1996. Wansten told Petitioner that the conspiracy charge encompassed other deals as well. Petitioner told Wansten that he was a heavy user and that his main source of cocaine was in Grand Rapids. Petitioner said that he would purchase two to four ounces per trip, that he made one to four trips a week, and that he had been buying cocaine for the past year. He said that his main customer was David Love. He explained that he sold Love two to four ounces and sold John Workman two ounces per purchase. Petitioner supported his own habit through sales. He said that the most he ever purchased at one time was four ounces. He would not divulge the name of his Grand Rapids source. Based upon Petitioner's admission, Detective Wansten concluded that Petitioner would have purchased 104 ounces or 2, 912 grams of cocaine a year if he had bought only two

ounces of cocaine each week. If he had purchased four ounces each week, he would have purchased 208 ounces or 5, 824 grams in one year.

Muskegon Police Detective Mark Baker testified as an expert witness in the area of cocaine use, possession, and distribution. He testified about his work with David Love during the investigation of Petitioner and explained the drug trafficking terminology on the taped recordings. For example, Detective Baker stated that he listened to a conversation between Love and Petitioner in which Love asked Petitioner, "Is Joe doing anything?" Petitioner replied, "yeah he is." Love said that they needed to get together and Petitioner told Love to call him the next day. Detective Baker explained that "doing anything" meant selling cocaine and was a common phrase in the narcotics business. He said that it was typical for the parties to a large drug transaction to have multiple contacts before the deal concluded. He also explained that a medium to heavy cocaine user would consume 1/8 to 1/4 of an ounce per week and that it would be unusual for a heavy user to consume an ounce a week. Detective Baker and a Michigan State Police analyst confirmed that the bag recovered from David Love on July 29, 1996 contained 111.9 grams of cocaine.

Petitioner did not testify at trial. At the close of trial, the jury convicted Petitioner of conspiracy to

deliver more than 225 grams but less than 650 grams of cocaine. The trial court subsequently sentenced him to life imprisonment as a repeat drug offender and to 20 to 45 years imprisonment as a second habitual offender.

Petitioner, through counsel, filed an appeal as of right with the Michigan Court of Appeals raising claims concerning the sufficiency of the evidence, prosecutorial misconduct, the jury instructions on the aggregation of cocaine amounts, and sentencing. Petitioner also filed a *pro se* supplemental brief raising claims concerning the trial court's jurisdiction, an amendment to the information, the lack of a jury instruction on co-conspirator credibility, the sufficiency of the evidence, and ineffective assistance of trial counsel for failure to investigate and challenge the conspiracy evidence. The Michigan Court of Appeals affirmed Petitioner's convictions and life sentence, but vacated the 20 to 45-year sentence. *See People v. Regelin*, No. 2203689, 1999 WL 33455093 (Mich. App. Jan. 29, 1999) (unpublished). Petitioner filed a delayed application for leave to appeal with the Michigan Supreme Court, which was denied. *See People v. Regelin*, 461 Mich. 899, 603 N.W.2d 642 (1999).

Petitioner, through counsel, subsequently filed a motion for relief from judgment with the trial court, raising claims of conflict of interest, insufficient

evidence, improper jury instructions on conspiracy and the inability to conspire with a police agent, and the ineffective assistance of trial and appellate counsel. The trial court conducted a hearing on the conflict of interest issue.

At that hearing, the parties stipulated that prosecutor Tony Tague would testify that Petitioner providing supplier information might have lead to a deal but no actual offer was made.

Trial counsel Pedro Ferrer testified that he represented Joe Gonzales in January, 1996 in a Kent County drug case (unrelated to the present case) and in another case in February, 1997. Ferrer acknowledged that the Joe Gonzales he represented at that time was the same Joe Gonzales named as an unindicted co-conspirator in Petitioner's case. Ferrer testified that he met Gonzales in 1991 and that Gonzales died in 1997. Ferrer testified that Petitioner informed him that the Joe Gonzales he had represented was the same one who was named as an unindicted coconspirator in his case.

Ferrer also testified that he did not have any conversations with the prosecution regarding deals involving testimony against Joe Gonzales. He stated that Petitioner denied making admissions to police regarding his drug dealing. He also stated that Petitioner told him that he was not going to take any pleas, that the police did not have a case against him,

and that he was not going to take any deals. Ferrer denied advising Petitioner to refrain from implicating Joe Gonzales because Gonzales had not been arrested in the case. Ferrer said that the only deal offered by the prosecution was for Petitioner to receive 10 to 20 years in Muskegon County and another 10 to 20 years in Kent County. Ferrer did not offer Petitioner's testimony against his supplier to the prosecution because Petitioner indicated that he was unwilling to go to prison for 20 years and he wanted to go to trial.

Ferrer testified that he warned Petitioner that he could face life imprisonment, as stated on the information. Ferrer knew that Petitioner wanted to testify at trial, but advised against it because he knew the risk to defendants, which included perjury and demeanor concerns, as well as Petitioner's cocaine use in this case. Ferrer testified that Gonzales being charged with conspiracy was "not even a consideration" and that he was loyal to Petitioner. Ferrer did not have a preference as to whether Gonzales was charged in Petitioner's case, but acknowledged that a conflict would have arisen had he been so charged. Ferrer did not recall Petitioner saying that he wanted to cooperate with police and give up his supplier, and denied discouraging Petitioner from doing so.

Ferrer stated that Petitioner knew that he had

represented Gonzales, but admitted that he did not inform the court or the prosecution of this fact. Ferrer could not recall whether he informed Petitioner that he was representing Gonzales in an unrelated Kent County case. Ferrer also testified that he presented the consecutive 10 to 20- year sentence offer to Petitioner and left it to him to decide whether to accept or reject the plea offer. Petitioner was not required to testify against anyone as part of the plea. Petitioner told Ferrer that the police wanted him to be a "snitch" and said that he would not do so. Ferrer testified that he never talked to Gonzales about Petitioner's case. He explained that his trial strategy was to attack the conspiracy and David Love's credibility, and stated that Gonzales was not a consideration.

Petitioner also testified at the hearing. Petitioner claimed that he told police that "Joe" was his supplier when arrested, but gave inconsistent testimony as to whether he provided a last name. According to Petitioner, Detective Wansten said that the police would work with him if he gave up his supplier, but he admitted that no specific deal was offered. Petitioner said that he and Ferrer discussed the named co-conspirators and Ferrer told him that he knew Joe Gonzales, that he had represented Gonzales and his sons, and that they "go way back." Petitioner claimed that he told Ferrer that he may

want to cooperate with the police, but Ferrer preferred that he not do so. Petitioner also said that Ferrer told him that the plea offer was for delivery of 50 to 225 grams with a sentence of 10 to 20 years, but did not mention pleading to the Kent County charge. Petitioner admitted that Ferrer told him that the alternative to the plea was a life sentence, and claimed that he told Ferrer they should work something out. Petitioner testified that Ferrer advised him not to take a plea because he would have to implicate Joe Gonzales who was not charged and there was no reason to do the police work for them. Petitioner admitted that Ferrer did not say that the deal required any testimony against his supplier. Petitioner claimed that he would have taken the plea of 10 to 20 years but for Ferrer's advice. Petitioner admitted that Ferrer advised him that the possible penalties were mandatory life imprisonment or a double penalty of 20 to 40 years imprisonment. He was also advised of the penalties at his arraignment.

Petitioner's mother, Peggy Eaton, testified that Petitioner was thinking of working with the police and taking a plea, but Ferrer advised against it because Petitioner would have to implicate Joe Gonzales who had not been charged. Eaton testified that Ferrer said the plea offer was 10 to 20 years. Eaton also said that Petitioner wanted to testify at trial, but Ferrer said no because he would have had to

testify against Gonzales. According to Eaton, Ferrer told them that he knew Gonzales but did not discuss any representation.

Muskegon County Prosecutor Victor Fitz testified that he presented a plea offer to Petitioner's counsel at the start of trial. The offer required Petitioner to plead to a lesser charge and receive 10 to 20 years in the present case and to plead as charged in a Kent County drug case for a consecutive 10 to 20 years. Fitz admitted that the police were interested in Petitioner's supplier at the time of his arrest. He said there was a possibility of a better deal if Petitioner had offered testimony against his supplier, but explained that the possibility lessened with the passage of time. Fitz could not recall if Ferrer said that he knew or represented Joe Gonzales. Fitz stated that the parties discussed whether the trial court was required to impose a mandatory life sentence as opposed to a double sentence at sentencing. He also recalled speaking to the Kent County prosecutor at the time of trial regarding Petitioner's plea opportunities.

Following the hearing, the trial court issued a written opinion denying the motion for relief from judgment. *See People v. Regelin*, No. 96-1-39927-FH (Muskegon Co. Cir. Ct. Feb. 26, 2002) (unpublished). The court found that Petitioner had not established cause and prejudice for his failure to raise the conflict

of interest claim on direct appeal. The trial court did not specifically address Petitioner's other claims in its written opinion.

Petitioner filed a delayed application for leave to appeal with the Michigan Court of Appeals, which was denied "for failure to meet the burden of established entitlement to relief under MCR 6.508(D)." *See People v. Regelin*, No. 247239 (Mich. App. June 2, 2003) (unpublished). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was similarly denied. *See People v. Regelin*, 469 Mich. 971, 671 N.W.2d 881 (2003). Petitioner's motion for reconsideration was also denied. *See People v. Regelin*, 469 Mich. 971, 677 N.W.2d 27 (2004).

Petitioner, through counsel, thereafter filed the present habeas petition asserting the following claims as grounds for relief:

I. Petitioner was denied his constitutional right to counsel by the conflict of interest of his counsel, Pedro Ferrer, who was also the attorney for the uncharged coconspirator.

II. The evidence of the actions of Petitioner, as a matter of law, was insufficient to constitute conspiracy.

III. The instructions to the jury on conspiracy were incorrect, misleading, and prejudicial.

IV. The court denied due process by not

instructing the jury that there can be no conspiracy with a police agent.

V. Petitioner was prejudiced by ineffective assistance of counsel.

VI. Petitioner was prejudiced by ineffective assistance of appellate counsel.

Respondent has filed an answer to the petition, asserting that the claims are procedurally defaulted and/or lack merit. Petitioner, through counsel, has filed a reply to that answer, as well as supplemental authority in support of the petition.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, govern this case because Petitioner filed his habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on

> an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d) (1996).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). "[T]he 'unreasonable application' prong of §2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. However, "[i]n order for a federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at

520-21 (citations omitted); *see also Williams*, 529 U.S. at 409.

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *See Williams*, 529 U.S. at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Section 2254(d) "does not require citation of [Supreme Court] cases–indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Mitchell*, 540 U.S. at 16. While the requirements of "clearly established law" are determined solely by the holdings of the Supreme Court, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. *See Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002) (Tarnow, J.).

Lastly, this Court must presume that state court factual determinations are correct. *See* 28 U.S.C. § 2254(e)(1). This presumption "applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *Carey v. Myers*, 74 Fed.

Appx. 445, 448 (6th Cir. 2003) (citing *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996)); *see also Summers v. Dretke*, 431 F.3d 861, 876 (5th Cir. 2005) (the presumption applies to "unarticulated findings which are necessary to the state court's conclusions of mixed law and fact"). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

IV. Analysis

A. Procedural Default

As an initial matter, Respondent contends that Petitioner's habeas claims concerning conflict of interest, the jury instructions, and the ineffective assistance of trial counsel are barred by procedural default because Petitioner failed to raise those claims on direct appeal of his convictions. Petitioner first presented the claims to the state courts in his motion for relief from judgment. The trial court denied the conflict of interest claim as procedurally defaulted under Michigan Court Rule 6.508(D)(3), finding that Petitioner had not shown good cause and actual prejudice for failing to raise the claim on direct appeal. The trial court did not specifically address the other claims. Both Michigan appellate courts denied leave to appeal "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)."

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). A petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. *Wainwright*, 433 U.S. at 85; *Coleman v. Mitchell*, 244 F.3d 533, 539 (6th Cir. 2001). In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263-64 (1989). The last *explained* state court judgment should be used to make this determination. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Supreme Court relied upon

Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal. That rule provides, in part, that a court may not grant relief to a defendant if the motion for relief from judgment alleges grounds for relief which could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting there from. *See* Mich. Ct. R. 6.508(D). The state court's decision, while brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Further, the record reveals that the trial court denied the motion for relief from judgment because Petitioner failed to establish cause and prejudice for not raising the claims on direct appeal of his conviction. *Cf. Abela v. Martin*, 380 F.3d 915, 922-23 (6th Cir. 2004) (Michigan Supreme Court's reference to MCR 6.508(D) may not be clear procedural default when a lower court denies relief on the merits).

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996). The "cause" standard in procedural default cases

"requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (citations omitted). Such factors may include interference by officials, attorney error rising to the level of ineffective assistance of counsel, or a showing that the factual or legal basis for a claim was not reasonably available. *Id.* at 493-94.

Petitioner alleges ineffective assistance of appellate counsel as cause to excuse his procedural default. Petitioner, however, has not shown that appellate counsel was ineffective. In *Strickland v. Washington,* 466 U.S. 668 (1984), the United States Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify acts that were "outside the

wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686).

It is well-established that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 754 (1983). The Supreme Court has explained:

> For judges to second-guess reasonable

> professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the ... goal of vigorous and effective advocacy.... Nothing in the Constitution or our interpretation of that document requires such a standard.

Id. at 754. Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990). Petitioner has failed to show that by omitting the claims presented in his subsequent motion for relief from judgment appellate counsel's performance fell outside the wide range of professionally competent assistance. Appellate counsel presented viable claims concerning the sufficiency of the evidence, prosecutorial misconduct, the jury instructions on aggregation of cocaine amounts, and sentencing on direct appeal. Petitioner has not shown that appellate counsel's strategy in presenting such claims and not raising other claims was deficient or unreasonable. Petitioner has failed to establish that he was denied the effective assistance of appellate counsel.

Petitioner also asserts as cause the fact that he did not understand that a conflict of interest could

arise from defense counsel's relationship with Joe Gonzales so as to present the conflict of interest claim in his supplemental pleadings on direct appeal. The mere failure to recognize the factual or legal basis for a claim does not constitute cause for a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 486 (1986). Further, the testimony at the evidentiary hearing established that Petitioner was well aware that defense counsel and Gonzales had a relationship that went "way back" and that counsel had represented Gonzales and his sons. While Petitioner may not have known of counsel's concurrent representation of Gonzales in Kent County (on an unrelated charge) until further investigation by counsel on collateral review, Petitioner possessed some knowledge of facts which could support a conflict of interest claim at the time of trial and direct appeal, but failed to pursue the matter. Petitioner has thus failed to establish cause to excuse his default.

This Court need not address the issue of prejudice when a petitioner fails to establish cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983). Nonetheless, even assuming that Petitioner has established cause to excuse his default, he cannot establish prejudice as his underlying claims lack merit. *See* discussion *infra*.

Lastly, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo,* 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). "To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner has made no such showing. His conflict of interest, jury instruction, and ineffective assistance of trial counsel claims are thus barred by procedural default, lack merit, and do not warrant habeas relief.

B. Conflict of Interest Claim

Petitioner first claims that he is entitled to habeas relief because trial counsel, Pedro Ferrer, operated under a conflict of interest due to counsel's representation of unindicted coconspirator Joe Gonzales, Petitioner's cocaine supplier, in an unrelated criminal matter in Kent County, Michigan. Petitioner claims that counsel's relationship with Gonzales caused counsel to advise Petitioner to

forego cooperating with the authorities, to forego accepting a plea bargain, and to forego testifying on his own behalf at trial.

A criminal defendant is entitled to the effective assistance of counsel free from conflict. *See Holloway v. Arkansas*, 435 U.S. 475, 483-84 (1978). The United States Court of Appeals for the Sixth Circuit has summarized the difference between the typical ineffective assistance of counsel claim and a claim based on an allegation that counsel was burdened by a conflict of interest as follows:

> Conflict of interest cases involve a slightly different standard than that used in traditional ineffectiveness claims. *See* [*Thomas v. Foltz*, 818 F.2d 476, 480 (1987).] Where there is conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692, 104 S. Ct. 2052. Thus, when an actual conflict of interest exists, prejudice is presumed. *See id.* Prejudice is presumed, however, "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). Thus, while the rule is rigid, it is not a *per se* rule. *See id. United States v. Hall*, 200 F.3d 962, 965 (6th Cir. 2000).

In short, prejudice will be presumed upon a showing that a conflict existed which adversely affected counsel's performance. First, a petitioner must show that his attorney "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350. "[I]f the conflict is as to a matter that is irrelevant or the conflict is merely hypothetical, there is no constitutional violation." *Moss v. United States*, 323 F.3d 445, 463-64 (6th Cir. 2003). A petitioner must point to specific instances in the record to suggest an actual conflict or impairment of his interests. *See Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir. 1987). A petitioner must "make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *Id.* (internal quotation omitted).

Once a conflict of interest is established, a petitioner must demonstrate that the conflict "actually affected the adequacy of [counsel's] representation." *Cuyler*, 466 U.S. at 349-50. The standard requires "a choice by counsel, caused by the conflict of interest." *McFarland v. Yukins*, 356 F.3d 688, 706 (6th Cir. 2004).

> Although the choice caused by the conflict does not have to be prejudicial in

> the sense of causing the defendant to lose the case, . . . the reasonableness of counsel's choice can be relevant as a factor in proving the choice was caused by conflict. A defendant or habeas petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing in order to accommodate a client's interests. Causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests. "[B]oth taking an action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse effect." *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (*en banc*).

Id. The possible adverse affects from a conflict of interest may arise during trial or during pretrial plea negotiations. *See, e.g., Quintero v. United States*, 33 F.3d 1133, 1136 (9th Cir. 1994).

The *Cuyler* standard applies to cases involving concurrent representation, but not to cases involving successive representation. *See Whiting v. Burt*, 395 U.S. 602, 618-19 (6th Cir. 2005); *cf Smith v. Hofbauer*, 312 F.3d 809, 817 (6th Cir. 2002) (refusing to extend *Cuyler* to ineffective assistance claim based on a conflict of interest arising from anything other than joint representation); *Benge v. Johnson*, 312 F.

Supp. 2d 978, 994 (S.D. Ohio 2004) (refusing to apply the *Cuyler* standard outside the concurrent joint representation context). Because the evidentiary hearing record indicates that attorney Ferrer was representing unindicted coconspirator Joe Gonzales in an unrelated matter for at least part of the time during which he was also representing Petitioner in this case, the Court will apply the *Cuyler* standard.

To prevail on his conflict of interest claim under *Cuyler*, Petitioner must show: (1) an actual and active conflict, and (2) the conflict adversely affected counsel's performance. In this case, Petitioner has arguably met the first element by demonstrating that counsel Pedro Ferrer represented him while he represented Joe Gonzales (in an unrelated case) and that their interests could conflict if Petitioner cooperated with the authorities or testified and implicated Gonzales in his drug dealings. *See United States v. Christakis*, 238 F.3d 1164, 1169-70 (9th Cir. 2001) (simultaneous representation of defendant and unindicted co-conspirator by same counsel could constitute an active conflict of interest).

Petitioner, however, has failed to show that an adverse affect on trial counsel's performance. At the evidentiary hearing, Pedro Ferrer specifically testified that he was loyal to Petitioner while representing him and that Gonzales being charged with conspiracy was "not even a consideration."

Ferrer further testified that he never spoke to Gonzales about Petitioner's pending case. *See* Evid. Hrg. Tr., pp. 22, 26-27, 43.

Petitioner claims that Ferrer's performance was adverse because Ferrer advised him not to cooperate with police and not to implicate Gonzales. Ferrer, however, denied advising Petitioner not to cooperate with police. Ferrer explained that Petitioner denied making admissions to police regarding his drug dealing and said that the police did not have a case against him. Ferrer also stated that Petitioner told him that the police wanted him to be a "snitch" but he would not do so. *Id.* at pp. 14, 28, 34, 45.

Petitioner relatedly alleges that Ferrer advised him not to accept a plea bargain and/or failed to pursue a better deal by having him offer testimony against Gonzales. At the evidentiary hearing, however, Ferrer denied advising Petitioner not to take a plea. Ferrer said that he approached the prosecutor about a plea and was initially rejected. The prosecutor subsequently offered a plea in which Petitioner would receive 10 to 20 years in Muskegon County and a consecutive 10 to 20 years in Kent County. Petitioner was not required to testify against anyone as part of the plea. *Id.* at pp. 18, 81. Ferrer said that he presented the offer to Petitioner and left it to him to decide whether to accept or reject it. Ferrer explained that he did not offer Petitioner's

testimony against his supplier to the prosecution because Petitioner said that he was unwilling to go to prison for 20 years and wanted to go to trial. *Id.* at pp. 16-20, 32. While there was some interest in identifying Petitioner's supplier at the time of his arrest, the parties agreed that the prosecution never offered a specific deal to Petitioner in exchange for his incrimination of Gonzales. *Id.* at pp. 14-15, 35, 48, 57, 88-89.

Petitioner further claims that Ferrer's performance was adverse because Ferrer advised him not to testify at trial (so he would not implicate Gonzales). Ferrer, however, explained that he advised Petitioner not to testify at trial because of risks, such as perjury, demeanor concerns, and Petitioner's cocaine use and admissions. *Id.* at p. 25, 40-41, 49. Ferrer said that his trial strategy was to attack the conspiracy and David Love's credibility, and he reiterated that Gonzales was not a consideration. *Id.* at p. 43.

In light of Ferrer's evidentiary hearing testimony, which this Court finds credible, Petitioner has not shown a causal connection between Ferrer's concurrent (but not joint) representation of him and Gonzales and Ferrer's performance in his case. Petitioner has thus failed to establish that an actual conflict of interest adversely affected trial counsel's performance. Habeas relief is therefore not

warranted on this claim.

C. Insufficient Evidence Claim

Petitioner next asserts that he is entitled to habeas relief because the prosecution presented insufficient evidence of conspiracy to support his conviction. Respondent contends that this claims lacks merit. This claim was raised on direct appeal and is not barred by procedural default.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court established that the standard of review for a sufficiency of the evidence challenge must focus on whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Pursuant to 28 U.S.C. § 2254(d)(1), this Court must determine whether the state court's application of the *Jackson* standard was reasonable. In making this determination, the Court must presume that the state court's factual findings are correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Warren*, 161 F.3d at 360-61.

Under Michigan law, a conspiracy involves the mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or a legal act by unlawful means. *See* Mich. Comp. Laws § 750.157a; *People v. Anderson*,

418 Mich. 31, 36 (1983). Conspiracy may be established by circumstantial evidence and may be based on inference. *People v. McKenzie*, 206 Mich. App. 425, 428 (1994). Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establishes an agreement in fact. *People v. Atley*, 392 Mich. 298, 310 (1974); *see also People v. Justice (after remand)*, 454 Mich. 334, 347 (1997). Michigan law recognizes "chain" conspiracies in which defendants may be convicted of conspiracy for their role in a drug chain where narcotics smugglers sell to middlemen who then sell to retailers. *See People v. Missouri*, 100 Mich. App. 310, 343, 299 N.W.2d 346 (1980); *see also People v. Meredith*, 209 Mich. App. 403, 412-13, 531 N.W.2d 749 (1995).

Delivery of more than 225 grams but less than 650 grams of cocaine requires proof of: (1) delivery of a substance containing cocaine; (2) the amount specified by statute; and (3) knowledge. *See* Mich. Comp. Laws § 333.7401(2)(a)(ii); *see also Justice*, 454 Mich. at 355. Under Michigan law, narcotic amounts delivered in small transactions may be aggregated where such conduct is shown to be part of a single scheme or plan to deliver the larger amount of narcotics charged. *See People v. Porterfield*, 128 Mich. App. 35, 41, 339 N.W.2d 683 (1983).

In concluding that sufficient evidence was presented to support Petitioner's conviction, the Michigan Court of Appeals stated:

> We have viewed the evidence in a light most favorable to the prosecutor and conclude that a rational trier of fact could find beyond a reasonable doubt that defendant was part of a "chain" conspiracy, with defendant's supplier, defendant, David Love, and John Workman sharing knowledge that the cocaine was being delivered for ultimate consumption by street users and agreeing to provide cocaine at various links along the chain to further this goal. *People v. Justice* (After Remand), 454 Mich. 334, 345-347, 355; 562 NW2d 652 (1997); *People v. Wolfe*, 440 Mich. 508, 515; 489 NW2d 748 (1992), *modified* 441 Mich. 1201 (1992); *People v. Porterfield*, 128 Mich. App 35, 41; 339 NW2d 683 (1983); *People v. Missouri*, 100 Mich. App 310, 343; 299 NW2d 346 (1980). Additionally, because the evidence supports an inference that the multiple deliveries of lesser amounts of cocaine were part of an ongoing criminal enterprise designed to distribute a significant amount of cocaine to street users for profit, these multiple transactions could be aggregated to establish the existence of the charged conspiracy. *Porterfield, supra*.

People v. Regelin, 1999 WL 33455093 at *1.

Having reviewed the record, this Court finds

that the Michigan Court of Appeals' determination in this regard is reasonable. Petitioner argues that there was insufficient evidence to convict him of conspiracy on the basis of Wharton's Rule, which provides that "when two people are necessary to perform a proscribed act, they may not be prosecuted for conspiracy to perform it, for their combination adds nothing to their intent to commit the crime." *See People v. Davis*, 408 Mich. 255, 278, 290 N.W.2d 366 (1980); *see also Iannelli v. United States*, 420 U.S. 770, 773 n. 5 (1975). However, the evidence indicated that Petitioner also interacted with his supplier and other individuals. David Love's testimony established the existence of a conspiracy between himself (prior to the time he was a police informant), Petitioner, Petitioner's supplier, and other named co-conspirators, such as John Workman. Love's testimony about his discussions with Petitioner and the amount of drugs involved in their transactions provided sufficient evidence for the jury to find that Petitioner and the coconspirators shared knowledge that the cocaine Petitioner obtained and supplied to others would ultimately be delivered for consumption by street users. *See, e.g., Malone v. Curtis*, 2000 WL 1137714, *8 (E.D. Mich. 2000) (denying habeas relief on similar insufficient evidence claim).

Additionally, Love's testimony, Petitioner's own

admissions, and the police testimony established that Petitioner conspired with various individuals to deliver more than 225 grams of cocaine during the relevant time period in 1995 and 1996. The testimony established that the ongoing transactions, which individually involved less than 225 grams of cocaine, were part of a larger plan to distribute more than 225 grams of cocaine. Petitioner has presented no evidence to rebut the state court's findings nor does he demonstrate that the state court's conclusion that the facts establish a conspiracy to deliver the requisite amount of cocaine is unreasonable.

Petitioner's insufficiency of evidence claim attacks the credibility of David Love's testimony and the inferences that the jury drew from that testimony. Such determinations, however, are not matters for federal habeas review. In *Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit stated: "A federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 970 (citing *Jackson*, 443 U.S. at 326).

Lastly, to the extent that Petitioner may be challenging the Michigan Court of Appeals'

construction or application of state conspiracy law, he is not entitled to habeas relief. "A claim that the state court misunderstood the substantive requirements of state law does not present a claim under § 2254. A federal court may not issue the writ on the basis of a perceived error of state law." *See Sanford v. Yukins*, 288 F.3d 855, 860 (6th Cir. 2002). Given David Love's testimony, the police testimony, and Petitioner's own admissions, this Court finds that the Michigan Court of Appeals' determination that a rational trier of fact could find the essential elements of conspiracy to deliver more than 225 grams but less than 650 grams of cocaine beyond a reasonable doubt was reasonable. Petitioner is not entitled to relief on this claim.

D. Jury Instruction Claims

Petitioner also asserts that he is entitled to habeas relief because the trial court failed to properly instruct the jury on the conspiracy charge and failed to instruct the jury that a police agent may not be part of a conspiracy.

In order for habeas relief to be warranted on the basis of incorrect jury instructions, a petitioner must show more than that the instructions are undesirable, erroneous or universally condemned; rather, taken as a whole, they must be so infirm that they rendered the entire trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *see*

also Henderson v. Kibbe, 431 U.S. 145, 154 (1977); *Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998). If an instruction is ambiguous and not necessarily erroneous, it runs afoul of the Constitution only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. *Estelle*, 502 U.S. at 72. State law instructional errors rarely form the basis for federal habeas corpus relief. *Id.* at 71-72.

The failure to give a defense instruction that is supported by the evidence does not automatically entitle a petitioner to habeas relief; the failure to instruct must have rendered the trial fundamentally unfair. *See Maes v. Thomas*, 46 F.3d 979, 984-85 (10th Cir. 1995); *Nickerson v. Lee*, 971 F.2d 1125, 1137 (4th Cir. 1995). A failure to instruct does not deprive a petitioner of fundamental fairness where the instructions as a whole adequately present the defense theory to the jury. *See Duckett v. Godinez*, 67 F.3d 734, 743 (9th Cir. 1995). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson*, 431 U.S. at 155.

Petitioner first claims that the trial court failed to instruct the jury that a conspiracy required an agreement to deliver the cocaine to a third party and could not be based upon a mere agreement between a buyer and seller. The trial court instructed the jury in

relevant part as follows:

> Anyone who knowingly agrees with someone else to commit the crime of delivery of 225 grams or more, but less than 650 grams of a controlled substance, cocaine, is guilty of conspiracy.
>
> To prove the Defendant's guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt: First, that the Defendant and someone else knowingly agreed to commit the crime of deliver of 225 grams or more, but less than 650 grams of a controlled substance, cocaine. Second, that the Defendant specifically intended to commit or helped commit that crime. Third, that this agreement took place or continued during the period from December of 1995 to October 9th of 1996.
>
> The crime of conspiracy to deliver 225 grams or more, but less than 650 grams of a controlled substance, cocaine, requires proof of specific intent. This means that the prosecution must prove not only that the Defendant did certain acts, but that he did the acts with the intent to cause a particular result. And for the crime of conspiracy to deliver 225 grams or more, but less than 650 grams of cocaine, this means that the prosecution must prove that the Defendant intended to commit or helped commit that crime.
>
> The Defendant's intent may be proved by what

he said, what he did, how he did it, or by any other facts and circumstances in evidence.

Now, let me define the crime of unlawful delivery of 225 grams or more, but less than 650 grams of a mixture containing a controlled substance, cocaine. Now, this crime has the following elements: First, the Defendant delivered a controlled substance. Second, the substance delivered was cocaine. Third, that the Defendant knew he was delivering cocaine. Fourth, that the substance was in a mixture that weighed 225 grams or more, but less than 650 grams.

Delivery means that the Defendant transferred or attempted to transfer the substance to another person knowing that it was cocaine and intending to transfer it to that person.

An agreement is the coming together or a meeting of the minds of two or more people, each person intending and expressing the same purpose. It is not necessary for the people involved to have made a formal agreement to commit the crime or to have written down how they were going to do it.

In deciding whether there was an agreement to commit a crime, you should think about how all the members of the alleged conspiracy acted and what they said, as well as all the

other evidence.

* * *

Concerning the charge of conspiracy to deliver 225 grams of or more, but less than 650 grams of cocaine, you may add the separate amounts involved to determine the amount of cocaine which was actually a part of the conspiracy if you find that an ongoing conspiracy existed. 4/10/97 Trial Tr., pp. 529-33.

The jury instructions as a whole were adequate to protect Petitioner's rights. The trial court instructed the jury on the elements of conspiracy and the delivery of more than 225 grams but less than 650 grams of cocaine. In particular, the court instructed the jury that Petitioner and one or more person had to knowingly agree to deliver more than 225 grams but less than 650 grams of cocaine and the court defined delivery as the knowing and intentional transfer or attempted transfer of the cocaine to another person. The jury was properly instructed that Petitioner could be found guilty only if the jurors found that he committed the crime charged. Petitioner has not shown that the trial court omitted an element of the crime or that the jury instructions rendered his trial fundamentally unfair.

Petitioner also claims that the trial court failed to properly instruct the jury that he could not conspire with a police agent, such that a conspiracy

conviction could not be based upon any agreement between Petitioner and David Love for their July 29, 1996 drug transaction. The trial court, however, instructed the jury as follows:

> This Court should instruct you that once David Love has begun to be associated with the police department and acting under their instructions, that he is no longer a member of a conspiracy and can no longer participate as a member in a conspiracy.

4/10/97 Trial Tr., p. 538. The next day, the trial court clarified its instruction:

> While it is true you may not consider the alleged delivery of cocaine form Mr. Regelin to Mr. Love on July 29, 1996, as proof of part of a conspiracy between Mr. Regelin and Mr. Love, you may consider the evidence of those acts you find were committed by Mr. Regelin to determine if there was proof of a conspiracy to deliver cocaine between Mr. Regelin and other persons.

4/11/97 Trial Tr., p. 550.

The trial court' instructions were sufficient to inform the jury that Petitioner could not be convicted for a conspiracy between himself and David Love relative to the July 19, 1996 transaction. The jury was well aware of Petitioner's defense to the charges. The Court must presume that the jury followed the court's instructions. *See Richardson v. Marsh*, 481

U.S. 200, 206 (1987); *see also United States v. Olano*, 507 U.S. 725, 740 (1993). Where, as here, the instructions as a whole adequately convey the defense theory of the case to the jury, a petitioner is not entitled to habeas relief based on the trial court's failure to give a specific instruction. *See, e.g., Rodriguez v. Young*, 906 F.2d 1153, 1166 (7th Cir. 1990). Petitioner has not established that the jury instructions, read as a whole, rendered his trial fundamentally unfair.

Furthermore, even if the trial court erred in instructing the jury, any such error was harmless. For purposes of federal habeas review, a constitutional error that implicates trial procedures is considered harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also O'Neal v. McAninch*, 513 U.S. 432, 445 (1995) (habeas court should grant petition if it has "grave doubt" about whether trial error had substantial and injurious effect or influence upon jury's verdict). This Court does not believe that any omissions in the jury instructions had a substantial or injurious effect or influence in determining the jury's verdict. As discussed *supra*, the evidence at trial was more than sufficient to support a finding of a "chain" conspiracy to deliver more than 225 but less than 650 grams of cocaine. Habeas relief is not

warranted on these jury instruction claims.

E. Ineffective Assistance of Trial Counsel Claims

Petitioner next alleges that he is entitled to habeas relief because trial counsel was ineffective for failing to appeal the pretrial ruling which amended the information to include the July 29, 1996 transaction, for advising Petitioner that he could receive a life sentence or the lesser sentence of double punishment upon conviction, for failing to request the aforementioned jury instructions, and for advising Petitioner that the prosecution could introduce evidence of a prior conviction if he testified.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the United States Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify acts that were "outside the

wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686).

Petitioner first contends that counsel was ineffective for failing to appeal the pretrial ruling which amended the information to include the July 29, 1996 transaction. This contention lacks merit. Counsel may have reasonably decided that such an appeal would be futile. In fact, the Michigan Court of

Appeals addressed the amendments to the information on direct appeal and upheld the trial court's decision. The court reasoned that although that transaction could not be used to establish a conspiracy between Petitioner and David Love, it could be used to establish a conspiracy between Petitioner and his supplier or other parties. *See People v. Regelin*, 1999 WL 33455093 at *3. Given this decision, Petitioner cannot establish that he was prejudiced by defense counsel's conduct in failing to appeal the pretrial ruling.

Petitioner next claims that counsel was ineffective for advising Petitioner that he could receive a life sentence or the lesser sentence of double punishment upon conviction. This contention lacks merit. The record reflects that Petitioner was charged as a repeat drug offender pursuant to a statute which would require a mandatory life sentence upon conviction and was charged as a second habitual offender which would result in a double punishment upon conviction. Trial counsel so advised Petitioner. The information also stated these facts. *See* Evid. Hrg. Tr., p. 21. Petitioner admitted that counsel advised him that the possible penalties were life imprisonment and double punishment and he knew he faced a life sentence upon conviction as a repeat drug offender. *Id.* at pp. 63, 68, 70. The fact that counsel's argued for double punishment under the

habitual offender provision rather than a life sentence under the repeat drug offender provision does not mean that counsel misunderstood the penalties. The record indicates that Petitioner was well aware that he faced a life sentence. Petitioner has not shown that counsel's performance in this regard was deficient or that he was prejudiced thereby.

Petitioner next asserts that counsel was ineffective for failing to request the aforementioned jury instructions. Given the Court's determination that those claims lack merit, Petitioner cannot establish that he was prejudiced by counsel's conduct. Further, the Court notes that trial counsel did request that the court instruct the jury that Petitioner could not conspire with David Love during the time he was operating as a police agent. *See* 4/10/97 Trial Tr., pp. 537-38.

Lastly, Petitioner asserts that counsel was ineffective for advising him not to testify and for stating that the prosecution could introduce evidence of a prior conviction if he testified. Petitioner has not rebutted the presumption that trial counsel's conduct in advising him not to testify constituted sound trial strategy. *See, e.g., Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002) (decisions as to what evidence to present and whether to call certain witnesses are matters of trial strategy). At the evidentiary hearing,

counsel testified that he advised Petitioner not to testify because of concerns about perjury, demeanor, and his cocaine use. *See* Evid. Hrg. Tr., pp. 25, 40-41. Moreover, Petitioner has not established that he was prejudiced by counsel's conduct as he has not shown that his testimony would have likely affected the outcome at trial. Petitioner has thus failed to satisfy the requirements of *Strickland* and is not entitled to habeas relief on his ineffective assistance of counsel claims.

F. Ineffective Assistance of Appellate Counsel Claim

Lastly, Petitioner claims that appellate counsel was ineffective for failing to raise the foregoing issues (other than the sufficiency of evidence issue) before the state courts on direct appeal of his convictions. Given this Court's determination that the foregoing issues lack merit, however, Petitioner cannot establish that appellate counsel was ineffective under the standards set forth in *Strickland, supra*. Habeas relief is not warranted on this claim.

V. Conclusion

For the reasons stated, the Court concludes that Petitioner is not entitled to federal habeas relief on the claims contained in his petition.

Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is **DENIED WITH PREJUDICE**.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE
DATED: February 24, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOREN REGELIN,

Petitioner,

CASE NO. 04-CV-70814-DT

v. HON BERNARD A. FRIEDMAN

ANDREW JACKSON,

Respondent.

_____/

JUDGMENT

The above-entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Bernard A. Friedman, United States District Judge, presiding, and in accordance with the Opinion and Order entered on this date;

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED WITH PREJUDICE.**

SO ORDERED.

DAVID J. WEAVER
CLERK OF THE COURT
BY: s/Carol L. Mullins
DEPUTY COURT CLERK

DATED: February 24, 2006
APPROVED: s/Bernard A. Friedman

Filed: September 24, 2007
Case No. 06-1520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOREN REGELIN,
Plaintiff-Appellant,
v.
ANDREW JACKSON, Warden,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

BEFORE: BATCHELDER and GILMAN, Circuit Judges; VARLAN,* District Judge.

ALICE M. BATCHELDER, Circuit Judge.

Loren Regelin was convicted by a state-court jury on a charge of conspiracy to deliver 225 to 649 grams of cocaine. The state-trial court sentenced him to life in prison as a repeat drug offender and Regelin appealed. The Michigan Court of Appeals affirmed

*Honorable Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

and the Michigan Supreme Court denied leave to appeal. Regelin never raised a claim on direct appeal that he was prejudiced by his attorney's alleged conflict of interest, but first raised it on a subsequent motion for relief from judgment.

Regelin then petitioned for post-conviction relief, raising a claim that his trial counsel had a conflict of interest and raising numerous other claims as well. The state trial court held an evidentiary hearing on Regelin's conflict-of-interest claim and ultimately denied the claim as having been procedurally defaulted. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.

Regelin next petitioned the United States District Court for the Eastern District of Michigan for habeas relief, raising the conflict-of-interest claim, a claim of ineffective assistance of appellate counsel, and several other claims. The district court denied the petition on the basis that Regelin could not establish cause and prejudice sufficient to overcome his procedural default of the conflict claim and finding the remaining claims either procedurally defaulted or meritless. The district court granted a certificate of appealability on the conflict-of-interest claim and this court granted a certificate of appealability on his claim of ineffective assistance of appellate counsel.

After carefully reviewing the record, the law, the briefs and arguments of counsel, we conclude that the district court's opinion correctly sets out the applicable law and correctly applies that law to the facts contained in the record. The issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinion, we **AFFIRM**.

No.06-1520

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOREN REGELIN,

Petitioner-Appellant,

v.

ANDREW JACKSON,

Respondent-Appellee.

FILED

JAN 15 2008

LEONARD GREEN, Clerk

ORDER

BEFORE: BATCHELDER and GILMAN, Circuit Judges; and VARLAN*, District Judge.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges** of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

petition is denied.

ENTERED BY ORDER OF THE COURT

SEAL

Leonard Green, Clerk

*Hon. Thomas Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

** Judge Griffin recused himself from participation in this ruling.